

United States iGaming regulation left to the States

2012 saw numerous attempts by US states to legalise and regulate online gaming, however the majority of those attempts failed. Now as attempts to regulate online gambling at a federal level have failed to materialise, it is the individual US states themselves that hold the real opportunity to legalise online gaming. Harsh P. Parikh and Heidi McNeil Staudenmaier of Snell & Wilmer LLP, discuss the current situation in the US as the states prepare to create a patchwork of legislation.

More than twenty five years ago, gaming in the United States faced a conundrum as Indian tribes and states debated the legality of gambling on tribal lands. The issue culminated in a landmark decision in the United States Supreme Court, *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), and eventually led to the passage of the Indian Gaming Regulatory Act (IGRA), Pub. L. 100-497.

The Obama Administration's 20 September 2011 opinion, made public on 23 December 2011, created a similar uncertainty in the realm of online gaming. The Department of Justice reversed its long-held position regarding the Wire Act of 1962. In the opinion, the Executive Branch concluded that the Wire Act applies only to sport-related gambling activities in interstate and foreign commerce.

Since the DOJ memorandum, many have taken the view that virtually all federal barriers to internet gaming have been removed. The reach of the DOJ's position, however, remains unclear. Regardless, in this brave new world without a clear federal roadblock, iGaming expansion in the United States will now only occur through patchwork, state-by-state regulation.

Failed federal efforts

At the end of 2012, the industry watched as Congress, yet again, failed to pass a law that regulates online gambling.

The House of Representatives introduced at least two bills: H.R. 1174 and H.R. 2366. Both failed to gather support to even allow for a hearing. In the Senate, during the lame duck session, Majority Leader Harry Reid (D-Nev) indicated that another bill would be introduced that was co-authored by outgoing Minority Whip Jon Kyl (R-Ariz). A few days after the elections, a draft of the Reid-Kyl online gaming bill

leaked to the public and optimism that a federal framework would develop was at an all-time high. The Reid-Kyl bill would regulate online poker, but would also ban all other forms of internet gambling.

History, however, repeated itself: despite growing support from both sides of the aisle, the lame duck session of the 112th Congress mirrored the failed efforts of 111th Congress. Senate was not able to slide internet gaming into any other pending legislation or the fiscal cliff negotiations.

The biggest opposition to the bill came from the States. Because states are now free to legalise intrastate internet gaming, local and state legislators saw federal action as being unnecessary. To that end, the National Conference of State Legislatures (NCSL) on 9 August 2012, passed a policy resolution urging the federal government to respect state sovereignty. The North American Association of State and Provincial Lotteries also announced that there is now no need for federal legislation. In the waning days of the Congressional session, officials from Kentucky, Idaho, Washington state, Missouri, New Hampshire, Georgia and Iowa traveled to Washington, DC to protest the Reid-Kyl bill. On 14 December 2012, Senator Reid officially pulled the plug on the draft iGaming bill. It is now clear that legalisation of gambling in the United States can likely only occur on a state-by-state basis.

Patchwork legalisation

With a failed federal effort, the gaming lobby is turning its full attention to state based legalisation of internet gambling. The DOJ's memorandum opinion of the Wire Act paved the way for the states to do what they want with intrastate internet gaming, and it didn't take

long for states to react. Since January 2012, bills that might legalise online gaming have been proposed in almost a dozen states, including California, Iowa, Maryland, New Jersey, Mississippi, Hawaii, Missouri and the District of Columbia. Most of these bills, however, died in session because of infighting among stakeholders.

Only two states and the America Virgin Islands succeeded in their quest to legalise and regulate online gaming. On 28 June 2012, Delaware's Gov. Jack Markell signed a bill allowing the State Lottery to operate full-scale online casinos. At the same time, Nevada's Gaming Commission began issuing licences to internet gaming operators; and on 20 June 2012, Bally Technologies, Inc. and International Game Technologies were the first to receive licences.

In December 2012, New Jersey's A2578 passed by a vote of 33 to 3 to allow internet gambling within the State. New Jersey's online gaming bill awaits the signature of Governor Chris Christie. It remains unclear whether Governor Christie will sign the bill or simply allow it to become law without his signature.

This type of patchwork legalisation may be problematic. For one, without a federal framework, tribal gaming interests are left at the mercy of individual states, with small gaming operators unlikely to participate in any expansion. Moreover, without players from other states, states with small populations will likely struggle to create an efficient and popular cyber gaming environment. In fact, Nevada Governor Sandoval has pledged to lead the charge of interstate agreements for online gaming. Larger states, like California, will still not agree to pool players with smaller states. Finally, variations in laws across the nation will also lead

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to a labyrinth of differing regulations for operators. A federal framework that allows interstate wagering is, thus, the most efficient avenue for iGaming expansion.

Prediction for the future

Despite the benefits of a nationwide framework for iGaming, it seems clear that there will be no federal solution to online gambling. State lotteries, casino operators and game makers across the United States are now turning to their state's legislators for any gaming expansion into cyberspace.

As legislators reconvene, California's Sen. Wright has already introduced SB 51, to regulate internet gaming in the golden state. Another gaming bill will likely also be introduced with tribal support. Massachusetts, Iowa, New York, and Illinois may also introduce similar laws to regulate online poker, but ban other forms of internet gambling. Additionally, the state of Washington is considering proposals to repeal its criminalisation of internet gambling.

Just as the IGRA was a boon for tribal gaming, leading to over 460 Indian gaming establishments across the United States, iGaming expansion promises to lead to a proliferation of gaming across the states. Patchwork legalisation requires that anyone in the online gaming industry be aware of the labyrinth of state laws. Indeed, the question is not if, but rather, how online gaming will be legalised in the United States.

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