

NEVADA BECOMES THE FIRST STATE TO LEGALISE INTER-STATE ONLINE GAMING

While New Jersey's Governor Christie deliberated on a third bill to legalise iGaming in the state having vetoed the previous two, his counterpart in Nevada, Governor Sandoval, was quickly signing through law that would see Nevada beat New Jersey to the punch in becoming the first US state to legalise inter-state online gaming.

On February 21, 2013, Nevada expanded its existing laws that permit and regulate online gambling by becoming the first state in the US to legalise online gambling on an inter-state basis. Specifically, Governor Sandoval signed into law Assembly Bill 114 ("AB 114"), a law that will allow Nevada to enter into compacts with other states that authorise online gaming. "This is an historic day for the Great State of Nevada," he said in a statement. "Today I signed into law the framework that will usher in the next frontier of gaming in Nevada. This bill is critical to our state's economy, and ensures that we will continue to be the gold standard for gaming regulation." The measure was earlier passed unanimously by the state's Assembly and Senate and is one of many bills to be considered by the Nevada State Legislature as part of its 77th Legislative Session, which convened on February 4 and adjourns on June 3.

AB 114 has several key aspects. Most notably, it removes the condition that licensed operators cannot accept wagers across state lines and instead authorises the Governor to enter into agreements with other states in the US. This is the focus of our article. However, before delving into this issue, we call your attention to another significant aspect of AB 114, namely the "bad actor" clause. This clause explicitly blocks companies and assets that continued to operate in the US following the passage of the Unlawful Internet Gambling Enforcement Act (UIGEA). Its purpose, therefore, is to prevent those companies that have operated illegal interactive gaming activities from benefiting from the

legalisation of the industry. This clause is similar to the exclusionary language in the reported but never introduced federal Internet poker legislation written by Senate Majority Leader Harry Reid, D-Nev., and now-retired Senator John Kyl, R-Ariz.

Specifically, AB 114 creates two classifications "covered assets" and "covered persons". A 'covered asset' is any tangible or intangible asset(s) specifically designed for use in and used in connection with the operation of an interactive gaming facility¹ that knowingly and intentionally offered interactive gaming in the US, in violation of UIGEA. The term includes, without limitation:

1. Any trademark, trade name, service mark or similar intellectual property under which an interactive gaming facility was identified to the patrons of the interactive gaming facility;
2. Any information regarding persons via a database, customer list or any derivative of a database or customer list; and
3. Any software or hardware relating to the management, administration, development, testing or control of an interactive gaming facility.²

The definition of a 'covered person' is divided into three categories. The first category is any person who owned five percent or more, or any amount that provides control, of an interactive gaming facility or an entity operating an interactive gaming facility that knowingly and intentionally operated interactive gaming in the US, in violation of UIGEA. The second

category is any interactive gaming service provider that knowingly or intentionally acted or proposed to act on behalf of a person falling within the first category, with knowledge that the interactive gaming facility operated in violation of UIGEA. The third, and final category, is any person who purchased or acquired, directly or indirectly: (i) five percent or more, or any amount that provides control, of any person who falls within the first or second category; or (ii) any covered assets, in whole or in part.³

Accordingly, AB 114 provides that "[a] covered person may not be found suitable for licensure under this section within five years after the effective date of this act"⁴ Moreover, even after five years, a covered person still may not be found suitable for licensure, "unless such covered person expressly submits to the jurisdiction of the United States and of each state in which patrons of interactive gaming operated by such covered person after December 31, 2006, were located, and agrees to waive any statutes of limitation, equitable remedies or laches that otherwise would preclude prosecution for a violation of any provision of federal law or the law of any state in connection with such operation of interactive gaming after that date."⁵

With regard to covered assets, AB 114 provides a person may not be found suitable for licensure within five years after the effective date of this act if such person uses a covered asset for the operation of interactive gaming.⁶ Additionally, the use of a covered asset by a licensee is grounds for revocation of an interactive gaming licence, or a finding of suitability.⁷

That said, AB 114 does allow the Nevada Gaming Commission ("Commission") to waive these prohibitions in certain circumstances. Most notably, the

¹ "Interactive gaming facility" means any Internet website, or similar communications facility in which transmissions may cross any state's boundaries, through which any person operates interactive gaming through the use of communications technology.

² See A.B. 114, 77th Reg. Sess., § 2 (Nev. 2013).

³ See A.B. 114, 77th Reg. Sess., § 3 (Nev. 2013).

⁴ See A.B. 114, 77th Reg. Sess., § 3 10(6)(a) (Nev. 2013).

⁵ See A.B. 114, 77th Reg. Sess., § 3 10(6)(b) (Nev. 2013).

⁶ See A.B. 114, 77th Reg. Sess., § 3 10(6)(c) (Nev. 2013).

Commission may waive the prohibitions where the covered person did not violate federal or state law in connection with its operation of interactive gaming or the covered asset was not used after the passage of UIGEA in violation of any federal or state law.⁸ The Commission shall afford any person applying for a waiver an opportunity to be heard and present relevant evidence.⁹ The Commission acts as finder of fact with the Nevada Gaming Control Board (“Board”) permitted to make investigations to determine any facts or recommendations that it deems necessary or proper to aid the Commission in making such determinations.¹⁰ A majority vote of the whole Commission is required to grant or deny such waiver.¹¹

Finally, the Commission shall make its determination with respect to a covered person or covered asset without regard to whether the conduct of the covered person or the use of the covered asset was ever the subject of a criminal proceeding for a violation of any provision of federal law or the law of any state, or whether the person has been prosecuted and the prosecution terminated in a manner other than with a conviction.¹²

While the so-called “bad actor” clause and the reasons behind it is worthy of its own dedicated article, as stated earlier, the focus of this article is on the legalisation of inter-state gaming in Nevada. In particular, AB 114 removes the condition that licensed operators cannot accept wagers across state lines until Congress or the US Department of Justice takes regulatory action.

The Nevada Revised Statutes previously stipulated that:

[A]ny licence to operate inter-state interactive gaming does not become effective until:

- (1) the passage of federal legislation authorising interactive gaming; or
- (2) the United States Department of Justice notifies the Commission or the State Gaming Control Board that interactive gaming is permissible under federal law.¹³

AB 114 deletes this provision in its entirety and mandates the Commission to formulate a set of regulations authorising the Governor to form compacts with other states in the US to provide interactive gambling across state borders. In particular, AB 114 states, in relevant part:

The [Nevada Gaming] Commission shall, by regulation, authorise the Governor, on behalf of the State of Nevada, to:

1. Enter into agreements with other states, or authorised agencies thereof, to enable patrons in the signatory states to participate in interactive gaming offered by licensees in those signatory states; and
2. Take all necessary action to ensure that any agreement entered into pursuant to this section becomes effective.¹⁴

In light of this, operators of interactive gaming systems licensed in Nevada will now be able to accept wagers from players located in other US states when those states enter into compacts with Nevada, thereby, expanding their player liquidity. It is important to note, however, that AB 114 currently does not permit Nevada to enter into compacts with foreign jurisdictions. While this may be expanded at a later date, given Nevada’s limited population, the ability to pool liquidity even if on a domestic level is crucial for the success of interactive gaming by Nevada operators. Accordingly, by passing this legislation, Nevada has created a potential market of between \$4 billion and \$10 billion annually, according to Board Chairman AG Burnett.¹⁵

Nevada is not the only state with a need to share player liquidity. Apart from a few of the nation’s most populated states (Texas, Florida and California), compacts among states will be necessary to generate sufficient player pools. Therefore, as states like New Jersey and Delaware continue forth and numerous other states begin exploring interactive gaming, each will likely come to the realisation that more players equals better viability. However, while necessity may spur states to form compacts, the

compact process certainly will not be without barriers and conflicts. Simply, state gaming regulation is not homogeneous. Rather, categories of licensure, suitability standards for applicants and technological requirements of gaming systems, etc, vary from state to state. For example, while some states intend to authorise all casino-style games, Nevada currently permits only online poker but no other type of Internet gambling.¹⁶ Additionally, the types of operations – state, tribal and commercial – also differ among the states. As a result, unique regulatory challenges arise as states begin exploring the creation of multi-state compacts. This is no more evident than in terms of revenue sharing. Under the terms of AB 114, any regulations adopted pursuant to this amendment must set forth provisions for potential revenue sharing arrangements between Nevada and any other state or agency within another state.¹⁸ This will undoubtedly be a point of contention during the negotiation of a compact, as each compacting state seeks to obtain a favourable share of revenue. Compromises will thus need to be reached in order derive a feasible compact.

The legalisation of inter-state online poker in Nevada, therefore, is an important step towards a successful interactive gaming industry in the US, but we are not there yet. Nevada, and other states that have chosen to legalise inter-state interactive gaming, now have to come to a consensus on how the industry will be operated and regulated. How this process occurs and what the end product will look like is still unclear. One thing is for certain, however, the forthcoming months will forever change the gaming landscape in the US.



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⁷ See A.B. 114, 77th Reg. Sess., § 3 10(6)(d) (Nev. 2013).

⁸ See A.B. 114, 77th Reg. Sess., § 7 (Nev. 2013).

⁹ See A.B. 114, 77th Reg. Sess., § 3 10(8) (Nev. 2013).

¹⁰ See id.

¹¹ See id.

¹² See A.B. 114, 77th Reg. Sess., § 3 10(9) (Nev. 2013).

¹³ See Nev. Rev. Stat. §463.750(2)(h).

¹⁴ See A.B. 114, 77th Reg. Sess., § 6(1) (Nev. 2013).

¹⁵ Cuevas, Arturo, “Online gaming: rolling a \$10-billion dice” (March 4, 2013)

¹⁶ See NGC Reg. 5A.140(1)(a).

¹⁷ See A.B. 114, 77th Reg. Sess., § 6(2) (Nev. 2013).