

# The US states inching ever closer to legalising i-gaming

Behnam Dayanim and Katie Sheridan of Paul Hastings LLP discuss the major legislative developments on the horizon in the US, as well as the initiatives in various states that have so far been out of the spotlight.

The logic behind the legalisation and regulation of i-gaming in the US remains compelling; whether pro-gaming forces can muster the coordination and effort to break through to new states in 2015 remains uncertain.

## Legislative developments on the horizon

### Congress

Recently, intense opposition to i-gaming by the influential and deep-pocketed Las Vegas Sands chairman and CEO Sheldon Adelson has shifted the focus of i-gaming supporters; their concern is now to stop a bill that would undermine state legalisation efforts by banning all internet gaming, even if purely intrastate. Although there has been some discussion that Congress may authorise poker only - with an opt-in for states - the current expectation shared by many seems to be that Congress will pass no legislation, leaving action to the states.

### California

I-gaming legalisation efforts in California have centred on poker, but have been beset by difficulties. First, i-gaming's original legislative champion, Sen. Roderick Wright, was convicted and resigned from office in September for reasons unrelated to gaming<sup>1</sup>. In addition, legalisation efforts have faced resistance and in-fighting among the state's Native American tribes, who are significant players in the state gambling scene, operating highly profitable bricks-and-

mortar casinos and boasting significant political muscle. At present, a critical mass in support of legislation appears to have coalesced, but hurdles - most notably, with racetracks - remain.

California's proposed legislation has included a 'bad actor' provision. Recently, that provision has attracted controversy in the wake of Amaya's acquisition of PokerStars. Adding to these obstacles is that Adelson has reportedly been lobbying against a pro-gaming bill in California<sup>2</sup>.

The prospect of legalised i-poker in California remains uncertain, though it is still one of the states most likely to pass legislation in 2015. Close observers believe passage in California would be a game-changer, because it would make it much harder for Congress to reverse state legalisation and would encourage banks and other payment providers to support the industry (the availability of deposit and withdrawal mechanisms for i-gaming in the currently lawful states has proven a challenge for players and operators).

### The rest of the United States

Currently pending bills vary. Some authorise poker only, while others would permit all casino games and poker. Some limit licensees to casinos, some are open to all applicants, and others limit licensure to lotteries. Many states would ban participation by bad actors or the use of their assets. All states would apply the same tax structure used for commercial bricks-and-mortar gaming - a percentage of 'gross gaming revenue' ('GGR') - rather than the 'deposit tax' seen in some early federal efforts. The tax rates proposed are generally lower than the rates applied to state-licensed commercial bricks-and-mortar gaming - ranging from a proposed 15% of GGR in New York ('NY')

to 28% in Pennsylvania (of course, in lottery-run states, all revenue would go to the state).

The two most significant states - both in terms of likely enactment and impact - are NY and Pennsylvania. Both states are large, and NY is the nation's financial centre. Approval of i-gaming in either state could change the climate for i-gaming more broadly and accelerate movement toward legalisation in many other states. Because this is an election year in all of the states in question, pending legislation will expire and will need to be reintroduced in 2015. We look at the bills that have been introduced as guides to what we might see moving forward.

### New York

Currently pending are two companion bills referred to committee in the state Senate and Assembly. Both would authorise poker only, due to limitations of the NY constitution, which prohibits 'pool-selling, book-making, or any other kind of gambling...'<sup>3</sup> NY would circumvent that obstacle by redefining gambling by statute to incorporate the 'predominance' (rather than the stricter 'material element') standard and expressly finding that the degree of skill in poker excludes it from the definition of gambling within the meaning of the state constitution. The bills would adopt the reasoning of the NY federal court in *US v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), which found poker to be predominantly a game of skill (although nonetheless violative of NY state law due to its more stringent standard)<sup>4</sup>.

Like Nevada, NY would include a 'bad actor' provision covering both persons and tainted assets. If passed, that likely would mean that Amaya's use of PokerStars' and Full Tilt Poker's assets would be

prohibited in New York. Notably, unlike proposed legislation in California, the bills would allow for interstate agreements, so long as the reciprocating states employ suitability reviews that are 'materially consistent' with those of NY - an apparent effort to prevent back-door entry of unsuitable parties (including prohibited bad actors). Finally, they would impose a 15% tax on GGR.

The appetite for i-gaming legislation seems to have cooled as NY moves to implement its expansion of land-based casino gaming. The hesitation may also result from initial revenue results from New Jersey that fell short of original (highly inflated) projections. Nonetheless, passage in NY remains very much a part of the conversation among observers, and a renewed push for enactment will almost certainly take place in the new year.

#### Pennsylvania

Pennsylvania, on most matters gaming, monitors its neighbours in New Jersey most closely. Pennsylvania's legalisation and expansion of commercial casino gaming is viewed as a significant factor in Atlantic City's recent struggles. Many Pennsylvania legislators view i-gaming as an attractive source of new revenue and are eager to tap its potential.

Interestingly, one of the three competing bills introduced would allow a wide range of casino games, although the other two would allow poker only. The two poker-only bills would open licensure to all applicants, but would prohibit bad actors and the use of their assets. By contrast, the casino game bill would permit licensure only of slot machine licensees (though any applicant could apply for a slot machine licence and internet gaming permit concurrently). In addition, the

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casino game bill would grant a presumption of suitability to existing bricks-and-mortar licensees. The bills also differ as to tax rates - ranging from 14% in the poker-only bills to 28% in the casino gaming bill. Like New York, Pennsylvania would authorise interstate agreements with other states.

#### Other states

None of the below states are viewed as likely to pass legislation before the states above ('the big three'). Again, all of these bills will expire at the end of the year, as a result of the elections. Nonetheless, noteworthy features of these state efforts include:

- Hawaii would permit a variety of casino games. The legislation would also create the Hawaii Internet Gaming Corporation, which would act as sole licensee<sup>5</sup>.

- The two bills introduced in Illinois are merely placeholders, containing no details regarding permitted games, licensees or other restrictions<sup>6</sup>. Efforts in Illinois fell victim to larger debates over the expansion of land-based gaming, but observers expect attempts to resume in 2015.

- Massachusetts this year saw two competing bills with important distinctions<sup>7</sup>. The first would have opened licensure to any applicant who otherwise meets the requirements for existing licensure, while the second would restrict licensure to existing licensees and consider other applicants only if no existing licensees chose to obtain an internet gaming licence. Neither bill contains a 'bad actor' provision, and only one contemplates interstate agreements.

- Texas would permit poker only, but similarities to the other states end there<sup>8</sup>. Unlike the other states considering regulation, Texas

would permit i-poker only if expressly authorised at the federal level. Texas regulators would be given the authority to regulate i-poker only if a federal law is enacted that creates a licensing program for i-poker operators and permits states to 'opt in' to that licensing regime. I-gaming is highly controversial in Texas, and passage of any legislation there in the near term seems unlikely.

In addition to the states where legislation was introduced in 2014, other states, such as Iowa and Mississippi, have considered the issue in recent years. Louisiana commissioned a study on the potential impact of i-gaming, and in West Virginia legislators introduced a bill to do the same. Action in these states likely remains further in the distance. Adoption by any of the 'big three' would provide a great deal of comfort to those states on the fence and may trigger a wave of similar legislative initiatives throughout the US.

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1. Patrick McGreevy, 'Convicted felon Roderick Wright to resign from state Senate,' LA Times (15 Sept 2014).
2. Las Vegas Sands Corp. reported spending over \$300,000 during the 2013-2014 California legislative session lobbying bills related to i-poker. See Cal. Sec'y of State, Cal-Access: cal-access.ss.ca.gov/lobbying/employers (search for Las Vegas Sands Corp.).
3. N.Y. Const., Article 1, § 9.
4. The DiCristina decision was reversed by the Court of Appeals on other grounds. US v. DiCristina, 726 F. 3d 92 (2d Cir. 2013).
5. S.B. 768, 27th Sess. (Haw. 2013); H.B. 1077, 98th Sess. (Ill. 2013); H.B. 1078, 98th Sess. (Ill. 2013).
6. H.B. 1077, 98th Sess. (Ill. 2013); H.B. 1078, 98th Sess. (Ill. 2013).
7. S.B. 197, 188th Sess. (Mass. 2013); S.B. 1826, 188th Sess. (Mass. 2013).
8. S.J.R. 43, 83rd Sess. (Tex. 2013); H.J.R. 141, 83rd Sess. (Tex. 2013); S.B. 1103, 83rd Sess. (Tex. 2013); H.B. 3529, 83rd Sess. (Tex. 2013).