



Tom Washington asks whether laws blocking post-UIGEA operators have a place in the industry and explores the impact they will have

**A**s online gambling regulation develops across the US, the biggest differentiator between states is arguably the inclusion or omission of so-called 'bad actor' clauses. The laws, designed to block companies that accepted US bets after the introduction of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), have been at the forefront of both regulators and operators concerns as widespread legalised online gambling becomes a reality.

In the past six months alone, language punishing post-UIGEA activity has been added, amended and even removed entirely from states' egaming frameworks. These laws of course change things for operators and the competition they will face, but more broadly they significantly affect the ability to form interstate relationships in order to share liquidity.

Nevada's 'bad actor' clause was an 11th hour amendment introduced in the form of AB 114 by Assemblyman William Horne, which passed – along with a change allowing interstate compacts – on 21 February. Initially prohibiting post-2006 operators for 10 years and subsequently reduced to five, it relates specifically to interactive gaming and how that person or business responded to UIGEA.

Jeff Ifrah, a partner with Ifrah Law, predicted back in August 2012 that New Jersey's 'bad actor' clause would never see the light of day, saying at the time: "[I] imagine New Jersey wants to maintain a competitive edge over Nevada and to encourage the top operators and their software to locate to New Jersey. To do so, New Jersey will clearly have to drop provisions like the tainted assets provision in the current section of the bill. The provision serves one purpose – to provide a competitive advantage to US-based software providers and operators."

Since then some states have followed Nevada's lead and others New Jersey's. Illinois' bill, having initially gone to the extreme of blocking operators that had accepted bets in the past 10 years, was altered in March to only include operators actually convicted of doing so. Massachusetts, meanwhile, has added language to an internet poker amendment blocking such companies, and further prohibits operators from displaying the trademark or brand name, business information or any information acquired or derived from a wager taken from US customers after 13 October 2006.

**Best intentions**

Historically, suitability checks have allowed gaming authorities to determine whether to grant a licence to gambling entities, based on the corporation or individual's criminal history, outstanding liabilities, and other conduct that may raise red flags about the applicant's likelihood to abide by the rules. However Ifrah argues that the new 'bad actor' and 'tainted assets' clauses relating to online gaming remove a regulator's discretion to consider these factors. "These clauses, imposed by the legislature and incorporated into the law, mandate that if an applicant has committed a certain action – usually a violation of the law – the applicant is prohibited from receiving a licence, no matter what other mitigating factors might be found in the applicant's history," he explains.

In many peoples' minds, such language is aimed squarely at PokerStars, the online poker giant targeting a return to the regulated US market despite continuing to accept wagers until 2011. On 15 April that year PokerStars, along with Full Tilt, Ultimate Bet and Absolute Poker were finally forced to exit the US, with their owners facing indictments over civil and criminal charges. The arguments for blocking these companies have been well documented, with many opining that particularly PokerStars – currently applying for an interim casino licence in New Jersey – would have a huge competitive advantage by using its database of US players and well-known brand.

**“ ” In my opinion, I feel the laws [blocking post-UIGEA operators] also covertly show deference to the federal government** A.G. BURNETT

Some saw it as an attempt to undermine New Jersey's regulation – signed into law earlier the same week – by highlighting its lack of retribution for post-UIGEA operators. The Garden State had included a provision addressing those who "knowingly and willfully offered, accepted, or made available bets, wagers, or stakes" online after 31 December 2006 last May. It was seen at the time as means of blocking PokerStars and Full Tilt from its soon-to-be regulated market, however this was cut from the bill in December.

The difference of opinion held by Nevada and New Jersey, two leading lights in gambling regulation, marks a key dividing line in this evolving US market. Some would say it puts New Jersey in a position of strength, as fewer barriers to entry mean it will likely boast the most popular poker operators' software and therefore attract greater player numbers. Others will say Nevada's five-year lock-out clause will make it a more attractive, sustainable partner for interstate compacts sought by other, perhaps more conservative states.



However, many would also argue these provisions would and should exist despite any impact on competition. Despite boasting a long history of stringent licensure, Nevada's gambling regulators, much like New Jersey's, are approving online operators and suppliers for the first time. This all means caution is the name of the game, and punishing post-UIGEA activity now appears to be as important, if not more, as traditional suitability checks.

Karl Rutledge, an associate with Nevada law firm Lewis & Roca, argues such provisions should be seen as a "tool to shield consumers from abuse" in a situation where the person or company holds a special position of trust such as in gambling. Conversely, Nevada Gaming Control Board chairman AG Burnett believes the law is designed to protect those who have "done the right thing" and "paid attention to whatever laws were out there, however unclear they may have been".

"The laws protect the regulatory system in that were a previous actor allowed into the state after having taken bets in the US in derogation of federal law, this might reflect poorly upon the state and perhaps even worse, allow entry by an actor who may or may not agree with your rules, depending upon how much money is at stake," Burnett says.

## There is no good reason for online gaming providers to be subject to stricter regulations than Citibank and Goldman Sachs

JEFF IFRAH

### Backlash

Yet there were many who saw Horne's amendment as a move by the industry's heavyweights to prevent their biggest competition gaining entry into the Nevada market. It was after all the American Gaming Association (AGA) – whose key members include the likes of Caesars Entertainment and Boyd Gaming – which later called on New Jersey's gaming regulators to block PokerStars' licensure in the state, claiming the operator has a history of "systematically flouting US law". The AGA's very public criticism was soon attacked by PokerStars' legal representatives who argued an approval of the association's petition "would empower the AGA's thinly veiled anti-competitive campaign against the entry of a competitor into the market".

As the number one poker site in the world, the implications of PokerStars' entry into the US market should not be underestimated. Even bwin.party's CEO Norbert Teufelberger, who described Poker-

Stars' New Jersey push as "their all-in card in the US", admitted in March: "If PokerStars don't get in [to New Jersey], it will really just be between us and Caesars." He will still be hoping for a two-horse race.

Despite the public dispute, Rutledge argues US casino operators are not behind these laws. "I really don't believe that this blocking is due to the universal wishes of incumbent operators," he says. "While in any industry there is a desire to protect one's business and opportunities from increased competition, at the same time some operators were looking to partner with companies that were blocked by AB 114. These operators realised the value in partnering with people that understand the internet gaming model and thus were looking to rely on their expertise. It cannot be said, therefore, that it was the collective wishes of incumbent operators to block such service providers from being able to service this industry."

Ifrah, who penned PokerStars' pertinent response to the AGA's claims, agrees that regulators should not take into account the wishes of an incumbent operator in a suitability determination. "It bears no relevance to the factors that the suitability determination is designed to assess," he says.

"A gaming authority may consider market factors in deciding whether to issue a licence for instance, in an oversaturated gaming market, the authority may find that licensure would not be the best course of action for the applicant, market, and economy. However, it would be inappropriate for a gaming authority to be influenced by the demands of competitors that merely fear healthy competition."

### Wider impact

The multiple variations of this law provide weight to the argument that a state-by-state patchwork of regulations is unsustainable for a successful US market in the long-term. With the absence of federal online regulation, states including Nevada are now taking a serious look at how interstate – or even international – compacts will work, in order to pool player liquidity and subsequently increase profitability. These relationships are set to be extremely tricky to form for reasons including the multitude of differing tax rates and types of product offered, let alone the added layer of complexity brought by states blocking and accepting certain operators based on past activity.

One theory is that two groups of regulated states will emerge. One faction, on the east coast including Pennsylvania and Delaware, will follow New Jersey's lead on most of the key points which make up its regulatory framework in order to ease the path to interstate agreements. Others, perhaps on the West Coast, could follow Nevada's stricter guidelines. "There will be states which look at this like Nevada

does and then some where strong lobbying influences exist where [post-UIGEA operators] might be able to prevail. It's all politics," says Frank Schreck, the chair of Vegas-based Brownstein Hyatt Farber Schreck's Gaming Law Group.

Yet the question of suitability in relation to gambling licensure is far more complicated and encompasses more than the indictments of what was dubbed 'Black Friday'. For European operators aiming to enter the US market, not through a casino acquisition as in PokerStars' case but through a partnership with an existing licensee, any hint of wrongdoing outside of North America could spell trouble. Take William Hill for example, which gained a land-based licence in Nevada last year. During its lengthy hearings in front of the state's Gaming Control Board and Gaming Commission, both its relationship with online joint venture partner Playtech and its presence in grey territory Australia were called into question.

Commission chairman Peter Bernhard queried whether the company was "still at Playtech's mercy" and expressed "concern" whether the operator had ever acted outside of Australia's gambling laws. The response from William Hill was swift, pulling out of Australia with almost immediate affect and later initiating a buyout of Playtech's stake in the William Hill Online JV. The British bookmaker's predicament is one faced by many European gaming companies, in that being whiter than white from a licensing perspective is absolutely crucial in order to be selected as a suitable partner by a US casino.

### European perspective

Eyebrows were raised in February when Boyd and MGM's software partner bwin.party's CEO Norbert Teufelberger was detained by police in Belgium and questioned over his company's continued, unlicensed presence in the country. Would this see Nevada's regulator take a dim view of the company, or worse cause its partners to get cold feet about their relationship? It seems neither were the case, and Schreck credits US regulators – though none have yet heard bwin's application – for making an effort to understand the regulatory environment facing European operators.

"I think the regulatory agencies, at least in Nevada, understand Europe and understand countries like Belgium have flaunted EU law," he says. "So they don't hold it against operators like bwin.party as they understand that EU law prevails and some countries aren't following it. A country cannot punish somebody either civilly or criminally for doing internet gambling unless they have a licensing scheme and regulations in place."

i

## A NATION DIVIDED:

How a selection of states have treated post-UIGEA operators so far

### Nevada

An amendment to its online poker bill blocks operators who accepted bets from US players after 2011 for five years

### New Jersey

A clause preventing post-UIGEA operators from obtaining a licence was removed from the Senator Raymond Lesniak's successful bill in December 2012. PokerStars is waiting to hear if it will be granted an interim casino operator licence in the state

### Massachusetts

The state's April budget outlined how it intends to block companies that willingly accepted post-UIGEA bets

### Illinois

Had included language proposing the same rule but for a longer period of 10 years. This was softened in March to only include those who have been convicted for such activity

### Delaware

The state, which has legalised poker and casino games and is set to launch later in 2013, included no such language in its regulation

Preventing companies from obtaining a licence to operate would appear a unique concept to the gambling sector. The likes of PokerStars may have settled with the US Department (with no admission of wrongdoing) over charges relating to their post-2006 US operations, however there appears to be little in the way of precedent set by other industries. Indeed, in recent years, some of the largest and most successful corporations in the world have been the subject of legal actions with the DoJ which have ended in settlement agreements, deferred prosecution agreements, or even a finding of liability or guilt. Yet they continue to operate and thrive because their governing regulations do not contain what Ifrah calls a "one strike" provision such as a 'tainted assets' clause. "There is simply no good reason for online gaming providers to be subject to stricter regulations than, for instance, Citibank, Goldman Sachs, and other financial institutions which continue to operate despite a history of alleged wrongdoing," he argues.

"In making a determination as to a corporate applicant, gaming authorities should not automatically exclude the corporation based on past conduct, but consider who was making the decisions at the time of the alleged wrongdoing. It would be more appropriate to exclude an individual that has made a bad decision on the company's behalf that to exclude an entire corporation."

Yet as Burnett argues, a DoJ settlement is not the crucial deciding factor as to suitability. "The focal point lies in their actions, what they knew, and why they did what they did outside of any settlement with the DOJ," he says.

"It lies with what our investigators find and how the company responds to that. We define suitability in the same general context as we use in the land-based space. The applicant, be it an entity or individual, must have those characteristics we deem worthy of whatever approval they are seeking. Some of these characteristics include honesty and integrity, for example. In my own personal opinion, I feel the laws [blocking post-UIGEA operators] also covertly show deference to the federal government, and a respect for its earlier attempts to do the same thing," he adds.

The two sets of polarised opinion remain and will remain a big factor in the US online gambling market. Regulators and politicians are no doubt under pressure from both sides, with worthy arguments for both an open, competitive market place and one that does not allow a post-UIGEA operator to succeed. The eventual winners of this battle might just win the war. ■