

New Jersey brings clarity with affiliate marketing guidelines

Under early versions of New Jersey's then proposed online gambling regulations, 'marketing affiliates' were included in the list of entities required to obtain an Ancillary Casino Service Industry Enterprise ('Ancillary CSIE') licence. However, this requirement did not appear in the state's final regulations, leading to some marketing affiliates applying for the Ancillary CSIE licence, while others registered as vendors. In June, the New Jersey Division of Gaming Enforcement released revised marketing affiliate guidelines to bring clarity to the issue of when a marketing affiliate must obtain Ancillary CSIE licensure and when it can simply register as a vendor, as Sarah Koch of Ifrac Law explains.

When New Jersey launched i-gaming in 2013, it did so using a newly-adopted regulatory framework, which established a licensing structure for online gaming operators and related vendors. While the New Jersey Division of Gaming Enforcement's ('DGE') comprehensive licensing structure is, for the most part, clearly laid out and easily implemented, it is impossible to anticipate every nuance of a new industry before it goes live. In response to questions that arose about the role of affiliate marketers since the launch last year, the DGE recently released guidance as to licensing requirements for affiliate marketers.

Affiliate marketers drive internet traffic to websites, and traditionally have earned a commission on each player they send to a gaming website. This 'performance-based marketing' arrangement has been

so effective that affiliate marketers can be credited with much of the success of the online gaming industry. Given their important role in the industry, the DGE contemplated the licensure of affiliate marketers early on in the regulatory process. During the comment period for New Jersey's proposed internet gaming regulations, the Division of Gaming Enforcement added 'marketing affiliates' to the list of entities required to obtain an Ancillary Casino Service Industry Enterprise ('Ancillary CSIE') licence at NJAC 13:69J-1.2(d), along with payment processors and customer identity, age verification, and geo-location services. At the time, the 'Frequently Asked Questions' section of the DGE's Internet Gaming webpage also reflected this requirement. Prior to finalisation, the DGE publicly announced a change to this regulation when it determined that payment processors would not have to obtain an Ancillary CSIE licence if they did not have direct contact with patrons' casino gaming accounts or the internet gaming system itself. However, it largely came as a surprise when the final regulations were published and the language specifying marketing affiliates had also been removed from the Ancillary CSIE provision.

Regardless of the change, a few affiliates opted to complete the Ancillary CSIE application process and have been granted a licence to operate in the New Jersey i-gaming space. However, absent a specific requirement to obtain an Ancillary CSIE licence, other online gaming marketing affiliates were happy to forgo the Ancillary CSIE application process, which requires a \$2,000 application fee, lengthy corporate and individual forms, fingerprinting, significant documentation, and the DGE's

determination of approval. Instead, many affiliates simply registered as vendors - a short, free, easy process required of every entity that provides services that are not specifically designed for internet gaming and patron interaction, who are not otherwise required to be licensed.

In June, the DGE released some much needed guidance regarding the circumstances in which internet gaming marketing affiliates must obtain full Ancillary CSIE licensure instead of merely registering as vendors. The affiliate's compensation model is key to this analysis. Essentially if the affiliate has a stake in the game - that is, if the affiliate's compensation is determined by the amount of money a referred player deposits or stakes - then the affiliate must obtain an Ancillary CSIE licence. If the affiliate has no interest in gaming actions, then it may register as a vendor.

The DGE identified three compensation models that only require an affiliate marketer to register as a vendor: Cost Per Impression, Cost Per Click, and Cost Per Action Flat Rate. Under the Cost Per Impression ('CPM') model, an affiliate is paid a flat fee based on the number of people that view its ad for a licensed New Jersey gambling website. Under the Cost Per Click ('CPC') model, the affiliate is paid a flat fee every time a user actually clicks an ad or a link and is taken to a licensed New Jersey gaming site. In a Cost Per Action ('CPA') arrangement, an affiliate is paid a flat fee for certain defined user non-gaming actions, for instance every time a referred customer signs up for a licensed gaming website, downloads a gaming app, deposits a certain amount of money, or places a certain number of bets. The unifying feature of the vendor registrant compensation models is

that they all pay flat fees for the specified actions.

In contrast, the DGE requires Ancillary CSIE licensure in instances where an affiliate's compensation is tied to the variable of a player's spending. This applies to CPA arrangements in which the affiliate receives a percentage of the deposits of every player it enrolls, or gets paid based on its enrollees playing, winning, or losing a certain amount of money on the site. It also applies to revenue sharing agreements in which an affiliate receives a percentage of the net gaming revenue of a user that it directed to the site.

The same flat fee vs. variable compensation analysis also applies in master-affiliate/sub-affiliate relationships. Both the master and sub must be registered or licensed by the state, but the level depends on the type of compensation received. For example, if the master-affiliate contracts with a New Jersey online gaming operator to refer sub-affiliates to the operator's website, the master-affiliate must obtain an Ancillary CSIE licence if it receives a revenue share based on the compensation of the referred sub-affiliate. On the other hand, if the master-affiliate was paid a flat fee for each referral, then the master only needs to register as a vendor.

All affiliates are required to submit their contracts to the DGE when registering or applying for licensure, as well as submitting all NJ contracts that they enter into subsequently. Affiliates may switch compensation models without undergoing additional licensure processes as long as the new compensation structure is in the same licensing class.

To a certain extent, the DGE's guidance on affiliate licensing levels properly accounts for the heightened risk inherent in the

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variable fee arrangement. Where an affiliate is compensated based on the dollar amount that a referral gambles, it has a stake in the game as well as an incentive to induce that player to spend as much money as possible - potentially using unscrupulous or misleading representations. By requiring licensure, New Jersey can better vet the affiliate and oversee its conduct. However, some of the vendor registrant models pose similar risks. In particular, the CPA models in which a registered vendor is paid based on the amount of money a player deposits or the number of bets he places pose many of the same concerns.

Even if an affiliate is properly licensed or registered in New Jersey, it may still run afoul of the regulations. Some registered affiliates had been promoting licensed New Jersey gambling websites as well as unregulated, largely offshore gaming operations. These promotion efforts diverted traffic toward unregulated sites largely because the consumer could not distinguish which sites were regulated by the state and which weren't (although New Jersey is now making an effort to educate players on this point).

In the spring of this year, the New Jersey Attorney General's office sent warning letters to a number of affiliate marketers, which had been engaging in the dual promotion of registered and unregistered gambling websites in the state of New Jersey. The letters asserted that the affiliates may be violating the criminal laws of the state of New Jersey by providing links to the unregulated sites and thereby promoting illegal gambling in violation of N.J.S.A. 2C:37(a)(2). The letters requested the recipients to immediately remove any online gaming links that are not authorised under federal law or under the law of any state, or risk

prosecution. In a statement, DGE spokeswoman Kerry Langan explained that the DGE's licensing requirements "ensure that only carefully vetted companies can provide internet gaming services. These illegal sites do not offer the same protections to players and we do not want these unregulated sites being promoted with our legal, regulated sites."

These letters sent a clear message - not just to the recipients, but to all affiliate marketers - that New Jersey is protective of its fledgling i-gaming market and that it will pursue anyone who threatens its integrity.

The DGE's guidelines and warning letters signify the Division's new emphasis on scrutinising who may advertise online gaming in New Jersey and how they may do so. These documents affirm affiliates' important role in the success of online gaming and ensure that they have a clear framework in which to operate.

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