

# SHAPE UP OR SHIP OUT: NJ'S NEW AFFILIATE GUIDELINES

The New Jersey regulator's revised affiliate guidelines are an important step towards helping bolster its struggling iGaming market and should set precedence for other states, writes **Rachel Hirsch** of Ifrah Law.

**Earlier this month**, the New Jersey Division of Gaming Enforcement (DGE) issued revised guidelines, clarifying its laws for online gaming affiliate marketers working with New Jersey-licensed operators. The revised guidelines follow a recent cease-and-desist letter sent by New Jersey's Assistant Attorney General George Rover to six affiliates, demanding these affiliates immediately remove any online gaming links that are not authorised under federal or state law under threat of civil and criminal sanctions. While the revised guidelines are intended to combat these types of affiliates, they are only the first step in a long road to bolstering New Jersey's struggling intrastate online gambling market.

In order to understand the DGE's concerns regarding affiliate marketers, consider the following: An uneducated consumer, learning for the first time that online gaming is legal in New Jersey, searches Google using the search terms "online gaming." This search, however, generates results from affiliate marketers and offshore online gaming companies. The entire first page of the Google search does not even generate a single result for a licensed New Jersey operator. To further complicate matters, the uneducated consumer has no idea that the sites generated as a result of the search are unregulated and unlicensed. For New Jersey regulators, this scenario is common and is exacerbated by a combination of factors – uneducated consumers in a market dominated by offshore operators,

where licensed operators are paying fees to regulators but are losing out to their unlicensed counterparts, who also drive tax revenue away from New Jersey. Affiliate marketing has of course always been a cornerstone of how online gambling operators acquire new players.

## **New Jersey's Affiliate Licensing Requirements**

New Jersey, as a licensed online gaming jurisdiction, takes oversight of affiliate marketers very seriously. However, even in the regulated New Jersey online gambling market, how operators utilise the efforts of affiliate marketers has been somewhat of a grey area from inception. In a letter issued earlier this month, the DGE clarified its existing guidelines for affiliate marketing. The DGE requires online gambling affiliate companies to be licensed under one of two distinct categories – "vendors" and "ancillary casino service industry enterprises" (Ancillary CSIE). Because there are different models within affiliate marketing, depending on the agreement between the affiliate marketer and operator, the type of licence that must be applied for depends on which model an affiliate employs. There are only two acceptable ways in which affiliates may operate in New Jersey.

### **Vendor Registration**

The first way is by applying for, and receiving, a vendor's permit issued by the DGE. The revised guidelines clarify that affiliates who

are paid a flat fee to direct traffic to a gambling website – which includes "cost per click" (CPC) and "cost-per-view" (CPV) – should apply for a licence in the "vendor registration" category. CPC compensation means that an affiliate earns a fee every time a visitor clicks on a link or banner that takes the visitor to an operator's website. CPV refers to an agreement where the affiliate receives payment each time a unique visitor views an advertisement.

Also in this category is the affiliate compensation model defined as "flat rate cost-per-action," where the affiliate receives a fee each time a visitor signs up for a gaming site or downloads its software, for example. Companies that engage in sponsorship deals with online gaming companies are also required to become Vendor Registrants.

Affiliates being licensed as Vendor Registrants must submit their Vendor Registration Form to a casino, which will then submit to the DGE. Affiliates must also submit a supplementary form themselves to the DGE.

### **Ancillary CSIE**

The second way in which affiliates can become eligible to work with New Jersey's online gaming operators is by receiving an ancillary license. The process to receive what's called an Ancillary CSIE license is far more comprehensive than vendor registration. Under the revised guidelines, affiliates that fall under the Ancillary CSIE licensing category are those that employ the form of "cost-per-action" (CPA) marketing that entitles them to a percentage of the customer's deposit or a percentage revenue share of the customer's lifetime spend at the site. Thus, an Ancillary CSIE is required if the affiliate

marketer is paid based upon how much money a player deposits or the total number of bets the player makes, if there is a revenue-share agreement between the affiliate and the gaming operator, or if there is a hybrid revenue-share agreement based in part on how much money the player deposits or bets.

According to the DGE, master affiliates will need to acquire an Ancillary CSIE license if they have a revenue share deal in place with their sub-affiliate(s). However, if the master affiliate and sub-affiliate only deal in flat-fee structured compensation plans, only a Vendor Registration is required.

In addition, the revised guidelines detail compensation models for Refer-A-Friend deals, in which an i-gaming website pays a flat rate to a user for each referral. No licence is required if the user receives less than \$2,500 in fees during a calendar year.

Regardless of the compensation scheme, DGE's latest guidance provides that the DGE will require all affiliates to produce a monthly report detailing all compensation, and all compensation must be based on the contract that the affiliate provides to DGE. Further, affiliates may not receive compensation for business gained through contracts that are based outside of New Jersey.

### New Jersey's Crackdown on Rogue Affiliates

The revised guidelines follow a cease-and-desist letter sent by the DGE in April to various poker affiliate sites, warning them, in no uncertain terms, that the advertising of offshore poker sites that offered games to New Jersey players would not be tolerated. The letter was signed by New Jersey Assistant

Attorney General George Rover and was sent to some of the most well-known affiliate websites in the industry: CardsChat.com, PokerSource.com, RakeBrain.com, Pokersites.com, RaketheRake.com, and one unnamed site. The letter to RaketheRake.com, for example, cited Bovada Poker, Merge Gaming, Black Chip Poker, and America's Cardroom as poker sites which are being promoted by the affiliate. None of those sites are based in the US, and none are approved by the DGE. According to the DGE, the advertising of unregulated online gaming sites taints legitimate sites by associating them with illegal ones, and conversely may lend the appearance that the illegal sites are somehow affiliated with authorised sites.

The continued presence of unlicensed poker rooms in states like New Jersey has put a major strain on licensed online poker rooms, which operate under a regulatory scheme that places them under certain constraints. Unlicensed online poker rooms, however, are not subject to the same rules as their licensed counterparts, allowing them to divert traffic to their sites from legitimate operators. For example, unlicensed rooms have a simpler sign-up process, which does not require a player verification check, the surrendering of a Social Security Number, or geo-location. Unlicensed rooms can also accept all types of payment options and are under no compunctions about miscoding a credit card transaction. Unlicensed online poker sites do not have to vet promotions or new games with regulators and have access to players beyond New Jersey, giving them far more liquidity than licensed rooms. And, more importantly, unlicensed rooms do not have to pay taxes, meaning smaller operating

costs and more revenue.

New Jersey's efforts to regulate affiliate marketers, through its cease-and-desist letters and revised guidelines, may help to bolster its struggling online gambling market, which suffered a decline in revenue over the past couple of months. In May, New Jersey's regulated online gambling market generated \$10.5m in revenue, a 9% drop from the previous month's total of \$11.4m and the second straight month of declining revenue since the market launched in late November 2013. Online casino revenue fell by \$600k to \$8.2m while poker revenue dropped over \$300k to \$2.3m. For the year-to-date, New Jersey's online market has earned \$53.5m, with casino accounting for \$38.9m and poker generating \$14.6m.

In a regulated online gambling market such as New Jersey, continued oversight of affiliate marketers is essential to help steer traffic to New Jersey's licensed sites and away from unregulated offshore companies. While there are still some kinks to work out – for example, how to manage and regulate “super-affiliates” – this move by New Jersey's DGE should set precedence for other states to follow, once they pass i-gaming legislation of their own.



Rachel Hirsch is an attorney at the Washington, D.C.-based law firm of Irah PLLC. Ms. Hirsch focuses her practice on complex litigation and transactions, with a particular emphasis on iGaming and Internet marketing and advertising. Her clients have included PokerStars, Full Tilt Poker, and Microgaming. Ms. Hirsch graduated with honors from the University of Maryland School of Law and practiced at Venable LLP prior to joining Irah Law. Email: rhirsch@irahlaw.com