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RE: Impact of Operations in Grey Markets on Suitability for Licensure

Internet gaming has revolutionized the casino industry by allowing gaming operators to transact business in multiple jurisdictions without maintaining any physical presence in the jurisdiction where the patrons are located. As a result, Internet technology has provided gaming operators with the ability to engage in gaming activities without the direct involvement of gaming regulators. This is in direct contrast to the strictly regulated and previously intra-jurisdictional nature of the "bricks and mortar" gaming industry.

These cross-border Internet gaming operations have caused uncertainty with gaming regulators regarding the legality of Internet gaming operations of their licensees in foreign jurisdictions and how those activities should be considered when evaluating suitability for licensure. This uncertainty in the minds of casino regulators is the result of a variety of factors: legislative bodies that failed to enact laws specific to online gaming, confusion regarding the applicability of existing land-based gaming laws to Internet gaming operators, in-personam jurisdiction issues inevitably created by the borderless nature of the Internet, and the lack of affirmative, concrete actions by the foreign government indicating whether it opposes Internet gaming by its citizens.

The Division of Gaming Enforcement ("Division") is cognizant that its own applicant and licensed Internet gaming platform providers ("platform providers") also operate in other jurisdictions. Jurisdictions where the legality of Internet gaming operations is an open question are often referred to as "grey markets," as opposed to "black markets" where it is clear that Internet gaming is prohibited and the government has taken action to stop online gaming activity. In light of this uncertainty, the Division is issuing this Director's Advisory Bulletin to New Jersey applicants and licensees to advise of the consequences that their operations in other jurisdictions will have on their



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suitability for licensure under the New Jersey Casino Control Act ("the Act"). *N.J.S.A. 5:12-1 et seq.*

Initially, the Division wishes to affirm its existing position that Internet gaming companies found to be operating in black markets will not be able to establish the "good character, honesty, and integrity" required for licensure in New Jersey. See *N.J.S.A. 5:12-89b* and *92b*. Black markets are defined as jurisdictions where government authorities have taken affirmative, concrete actions to actively enforce laws that prohibit online gaming, or have issued unequivocal official pronouncements that online gaming is not legal in the jurisdiction. Additionally, a New Jersey applicant or licensee may not engage in Internet gaming in a jurisdiction where Internet gaming is both legal and regulated unless they have secured the required regulatory approvals.

The more difficult determination for the Division is assessing the suitability of a New Jersey applicant or licensee that is engaging in Internet gaming activity with patrons in a jurisdiction where the existing law or actions/inactions of government officials with respect to the legality of online gaming is unclear or inconsistent. As noted above, these jurisdictions are commonly referred to as grey markets.

Clearly, when a government agency attempts to divine the intentions of another sovereign jurisdiction through a critical evaluation of local circumstances and resulting actions or inactions, any conclusion reached is fraught with the likelihood of error or misinterpretation. The motivations of why a jurisdiction enacts or enforces laws are often not readily apparent. In certain instances, local political considerations (which can change rapidly) are the motivating force, rather than a substantive analysis of Internet gaming policy. Similarly, government policy regarding Internet gaming activities may be influenced by, or subject to, conflicting policies of a regional government organization. One example involves the legal status of Internet gaming in the European Union ("EU"). The domestic Internet gaming policies of certain Member States are currently the subject of legal uncertainty which arises out of a contradiction between EU market principles and the unwillingness of certain Member States to surrender local control. In those Member States where this ongoing legal conflict between EU and local law exists, it would be problematic for an outside gaming regulator such as New Jersey to reach a conclusion regarding the ultimate legality of the Member State's Internet gaming policies when they potentially conflict with the EU's regional jurisdiction.

It is in this context that the Division finds itself attempting to articulate a licensing standard that fulfills its regulatory responsibilities under the Act while also giving proper deference to the sovereignty of other jurisdictions. After careful consideration of the various issues implicated in its decision the Division, in assessing the legality of Internet gaming in a foreign jurisdiction, will not adopt a standard that could erroneously substitute its own judgment for that of another sovereign jurisdiction's executive, legislative or judicial authority. The state of the law in many jurisdictions is constantly evolving and often defies a clear categorization, making it extremely difficult for the Division to adopt a more stringent approach.


As a result, the Division will examine whether or not the jurisdiction has a law that specifically prohibits Internet gaming and, if so, whether the jurisdiction has taken affirmative, concrete action to enforce that law. Types of affirmative, concrete enforcement actions include the government

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instituting a criminal or civil action against operators in the jurisdiction or the issuance of a formal cease and desist letter sent by a senior government official to an Internet gaming operator, or affirmatively notifying this Division of its prohibition. Where a jurisdiction has refrained from taking any affirmative, concrete action to prevent an Internet gaming market from developing within its borders, the Division will consider such a jurisdiction a grey market for purposes of assessing suitability under the Act. Companies that participate in Internet gaming activities in grey market jurisdictions and do not participate in black market jurisdictions will be deemed by the Division to be suitable for licensure in New Jersey.

In conclusion, the Division will individually examine each jurisdiction in which a New Jersey applicant or licensee operates pursuant to the above analysis to determine whether Internet gaming activities in that jurisdiction are objectionable and would therefore be considered a negative factor in assessing suitability for licensure. After careful consideration of this complex subject, the Division is of the view that this is the most reasonable and practicable standard to adopt, since it gives the appropriate deference to the sovereignty of other jurisdictions while also allowing the Division to enforce its statutory authority to assess the good character, honesty, and integrity necessary to establish or maintain licensure in New Jersey.

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David Rebeck
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