

# NJDGE: LAST CHANCE FOR AFFILIATE COMPLIANCE

While the NJDGE's recent Advisory Bulletin regarding affiliates takes a softer stance than last year's cease-and-desist letter, those serious about the market now have until November to make any necessary changes, writes **Rachel Hirsch** of Ifrah Law.

In June, **David Rebeck**, Director of the New Jersey Division of Gaming Enforcement (DGE), issued an Advisory Bulletin ("Bulletin") regarding online gambling affiliate marketers. This clarifies the Division's stance on affiliates who have marketed unlicensed gaming sites to New Jersey (NJ) residents and sets a 150-day clock for affiliate marketers who now work with NJ-licensed operators, or who wish to do so in the future, to comply with all applicable state and federal gambling regulations. The Bulletin follows last year's cease-and-desist letter sent by NJ's Assistant Attorney General George Rover to six affiliates, demanding they immediately remove any online gaming links that are not authorized under federal or state law under threat of civil and criminal sanctions. While last year's letter adopted a more rigid approach of "comply now or face immediate enforcement," this year's Bulletin demonstrates a more softened stance toward affiliates of "deferred enforcement" following a sizable grace period.

## The 150-day grace period

The Bulletin, entitled, "*Internet Gaming Affiliates/Marketing on Behalf of Illegal Online Gaming Sites*," signals a new "deferral on enforcement" approach taken by the DGE – in essence, a last chance for affiliate

compliance. Director Rebeck stated in the Bulletin that the state will not take legal action against affiliates who promoted illegal sites after the regulated NJ online gambling market began in November 2013, so long as they cease promoting unlicensed sites within 150 days of the issuance of the Bulletin. Specifically, the Director addresses in the Bulletin:

- (1) Whether affiliates who have promoted or marketing illegal online gaming sites since the adoption of online gaming in New Jersey would be subject to enforcement action by the Division if they cease such activity; and
- (2) Whether such prior conduct would result in a finding of unsuitability if affiliates apply to the NJDGE for licensure.

As to the first issue, the bulletin started a compliance clock set for 150 days, which begins on June 4 and expires on November 1, 2015. At the end of that period, affiliates must:

1. "Completely cease promoting or marketing directly or indirectly, any illegal online gaming sites accepting wagers from players in the United States."
2. Submit a notarized Certification from the CEO or COO to the DGE "attesting to that fact."

Should an affiliate comply with these prerequisites, the DGE will not take any

enforcement action against the affiliate or its principal owners and officers/directors or consider the affiliate's past conduct as a reflection on the affiliates future suitability for licensure or registration. However, should an affiliate fail to comply within the 150-day window, the penalty is clear:

"[N]on-compliant affiliates and their principals, officers and directors, as well as any future applicants, will be deemed unsuitable for licensure or registration by the Division going forward." Director Rebeck clarified that non-compliance means that "the negative suitability will attach to each principal owner, officer, and director regardless of any changes in corporate ownership and structure." The penalties for non-compliance do not extend to NJ licensing alone. Indeed, the Bulletin warns that "the Division will advise all other gaming regulatory agencies which affiliates, and their principal owners, officers and directors, have not complied with New Jersey law and identify each as unsuitable for licensure or registration in New Jersey."

Since issuing the Bulletin, the DGE has further clarified that the compliance policy applies to existing and future affiliates and that the restrictions apply to all affiliates promoting online gambling sites that are not licensed by a regulator in the U.S. to any U.S. traffic – including, but not limited to, NJ. For affiliates currently licensed by the Division that do not comply within the 150-day grace period, Director Rebeck explained in the Bulletin that "revocation

of a license or registration, and/or the imposition of a monetary penalty are also potential consequences for such conduct.” Affiliates not engaged in the promotion of illegal sites are not subject to the compliance conditions – meaning, any affiliates who file certifications at the end of the 150-day window could arguably be assumed to have promoted illegal sites (although compliance appears to absolve them of any past conduct).

### Affiliates and post-UIGEA conduct

The Bulletin also devotes a section to gambling affiliates who promoted illegal gaming websites after the passage of the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006. It provides: “The Division, after careful consideration, has made a determination that the conduct of affiliates under UIGEA can be distinguished from the past conduct of online operators and payment processors.” The Bulletin goes on to state: “While affiliates were paid under various compensation models for marketing to US payers after UIGEA, there was clearly some legitimate uncertainty as to whether the actions of an affiliate promoting or marketing to an illegal gambling site was, in and of itself, an illegal act.” Thus, while gaming operators have often had their post-UIGEA conduct held against them, the DGE does not attach the same stigma to affiliates, which the DGE views as being at least one step removed from actually consummating an illegal gambling transaction. According to the DGE, this demarcation between site operators and affiliates is due to its determination “that affiliates did not actually consummate the gaming transaction or process the payment of such activity. Therefore, the Division has taken the position that it “will not direct its investigation resources nor take enforcement action” against online gambling affiliates who promoted illegal gaming websites

post-UIGEA, “provided they come into full compliance with New Jersey law and the laws of other states” within 150-days.

### The DGE’s shift in attitude

The DGE’s deferred enforcement approach signals a departure from the more aggressive position it adopted last year in issuing cease-and-desist letters to six U.S. affiliates, including highly trafficked sites such as CardsChat.com, requesting they immediately remove any online gaming links that are not authorized under federal law or under the law of any state and threatening to pursue legal action should they not comply. The Division’s actions compelled offshore operators, such as the Bovada, to either stop accepting new registrants from NJ or abandon that market altogether.

This summer’s Bulletin represents a more moderate approach by the Division, begging the question: “Why has the DGE shifted its attitude toward affiliates promoting unlicensed gaming sites?” Perhaps the DGE’s seemingly new-found tolerance of affiliates can best be explained by the imperative role affiliates play in drawing players to online sites. Rather than alienate affiliates entirely by immediately “laying down the hammer” – a counterproductive move for a market in desperate need of generating increased online gaming revenue – the Division realizes a gentler approach may be necessary to attract more affiliates, and, by extension, increased traffic, to NJ’s online gaming market. Certainly, it’s “let bygones be bygones” approach to affiliates who marketed illegal gaming sites in the U.S. post-UIGEA will attract more affiliate marketers to the State, without fear that their post-UIGEA activity, like that of some site operators, will negatively impact their suitability determinations.

With this new Bulletin, the DGE now has the most robust policy position regarding

online gambling affiliates of the three states (New Jersey, Nevada, and Delaware) that have regulated online gaming within their borders. These new policies will force affiliate marketing sites – which includes major informational websites, personal blogs, and anyone else who earns income referring players to gaming sites – to make some tough decisions in the coming months. Their choices are to (1) comply; (2) leave the NJ market; or (3) continue promoting unlicensed sites and face enforcement. At the conclusion of the 150-day compliance deadline, the DGE will review all registered and licensed affiliates and take action against those that are non-compliant, including barring non-compliant affiliates (as well as their principals, officers and directors) from future licensure and registration. For those sites hoping to capitalize on the NJ market, this is the right time to make any necessary changes to be deemed compliant. After all, the last thing any affiliate marketer needs is not only to be blacklisted in NJ, but also risk that stigma spreading to other states given the influence that the NJDGE now carries as a leader in setting affiliate marketing guidelines. Come November 5, 2015, the expiration of the 150-day grace period, the fate of these sites will be determined.



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