

GAMING LEGALNEWS

I-GAMING IN THE UNITED STATES VERSION 2013: BACK TO THE STATES?

by Peter J. Kulick

Optimism had inched higher that the United States would shift its i-gaming policy from a prohibitory approach to allowing some form of i-gaming. At the federal level, the growing optimism from supporters of authorizing i-gaming derived from a December 2011 Department of Justice ("DOJ") memorandum opinion which concluded that the federal Wire Act, 18 USC § 1081, *et seq.*, extended only to sports wagering. While the DOJ memorandum represented a complete reversal of long-standing interpretation of the Wire Act, the legal force of the memorandum is not the same as an act of Congress and would likely not be legally binding precedent. In any event, there was reason to believe that the DOJ memorandum could serve as the impetus for Congress to finally act on legislation authorizing some form of i-gaming in the United States.

Rumors persisted during the lame duck sessions of both the 111th and 112th Congresses (occurring after the November 2010 and November 2012 elections, respectively) that Senate Majority Leader Harry Reid (D-Nevada) would secure the passage of legislation authorizing i-poker in the United States. Despite growing support on both sides of the political aisle, each lame duck session ended without i-poker legislation even being introduced. The failure to pass federal i-poker legislation demonstrates that the gaming community has not fully unified on the scope of federal i-gaming policy. For instance, the National Indian Gaming Association voiced concern over Senator Reid's legislative proposal. As Congress now faces renewed battles every 60 to 90 days with respect to fiscal policy and the likelihood of sequestration of fiscal appropriations, it appears more and more unlikely that Congress will tackle federal i-gaming policy in the 113th Congress.

With a diminished likelihood of congressional action, the attention in 2013 will now turn back to the states. Several leading gaming legal commentators have long advocated for the proposition that individual states were the most promising avenue to achieve authorized i-gaming in the United States. Pronouncements in late 2012 and early 2013 from Nevada and New Jersey offer some promise that 2013 may prove to be the year that authorized i-gaming is formally launched in the United States.

By 2011, Nevada had adopted a robust interactive gaming regulatory system. In 2012, Nevada began to issue interactive gaming licenses to both operators and suppliers. Nevada law, however, still requires either the enactment of federal law authorizing i-gaming or notification from the DOJ that i-gaming is permissible under federal law. Thus, while a robust regulatory regime has been adopted and licenses issued, no



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bets have yet to be accepted in Nevada. All this could change if the Nevada Legislature adopts legislation during its 2013 session that was pre-filed in the General Assembly on December 19, 2012. The legislation, Nevada Assembly Bill 5, would eliminate the requirement of enactment federal law or DOJ notice as a precondition for interactive gaming to commence in Nevada.

Nevada Assembly Bill 5 would also address another concern relating to the potential viability of the Nevada intrastate i-gaming market and, moreover, offer the opportunity for expanded i-gaming in the United States. The question has been raised whether Nevada will have sufficient liquidity to support an intrastate i-poker market. Nevada Assembly Bill 5 presents a potential solution to intrastate liquidity concerns. The legislation would authorize the Nevada Governor to enter into compacts with other states allowing for residents of other states to place bets with licensed Nevada interactive gaming operators. Assembly Bill 5 could lead to cementing Nevada's place as the leading i-gaming regulator in the United States.

The New Jersey Legislature has renewed efforts to authorize intrastate i-gaming. The New Jersey Legislature previously adopted legislation two years ago which would have authorized i-gaming within the state. However, Governor Chris Christie, citing state constitutional concerns, vetoed that legislation. In late December, the New Jersey Legislature again sent i-gaming legislation to the desk of Governor Christie. Thus far, Governor Christie has been tight-lipped with respect to whether he will sign the bill. Under New Jersey law, Governor Christie has 45 days to sign or veto the bill.

The attitude towards i-gaming in the United States has evolved considerably during the past two years. An increasing number of Members of Congress on both sides of the aisle have voiced support for the enactment of federal i-gaming legislation. Nevertheless, federal legislation authorizing i-gaming has still not come to fruition. The discussion at the state level continues to advance, however. With the DOJ's shift in the interpretation of the Wire Act, many states have begun to focus on i-gaming policy. Recent actions in Nevada and New Jersey could increase the likelihood that bets will be legally accepted in the United States at some point during 2013.

CONGRESS PASSES FISCAL CLIFF DEAL WITH POTENTIAL TAX BENEFITS FOR THE GAMING INDUSTRY

The end of 2012 and the early hours of 2013 for the United States were filled with anxiety with respect to whether the politicians could reach an agreement to avert the United States economy falling over the "fiscal cliff." An agreement was reached in the early hours of 2013 in legislation passed by Congress entitled the "American Taxpayer Relief Act" (H.R. 8). The American Taxpayer Relief Act temporarily eliminates the risk of a shock to the economy which may have resulted due to the mix of drastic tax increases and cuts in federal spending. For the gaming industry, the American Taxpayer Relief Act operates to extend a host of favorable business tax law programs.

Provisions of the American Taxpayer Relief Act which may be beneficial to the gaming industry include:

- Extending the research credit.
- Extending bonus depreciation.
- Renewing favorable recovery periods for the costs associated with certain qualifying leasehold and retail improvements and restaurant property.
- Extending the Work Opportunity Credit.
- Renewing the Indian Employment Credit and allowing for accelerated depreciation for property located on Indian reservations.

A more comprehensive overview of the potential benefits of the American Taxpayer Relief Act for the gaming industry is the subject of an upcoming article appearing in *Casino Enterprise Management* written by Dickinson Wright member Peter J. Kulick.