STATE OF NEW YORK

3898

2017-2018 Regular Sessions

IN SENATE

January 27, 2017

Introduced by Sen. BONACIC -- read twice and ordered printed, and when printed to be committed to the Committee on Racing, Gaming and Wagering

AN ACT to amend the racing, pari-mutuel wagering and breeding law and the penal law, in relation to allowing certain interactive poker games

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The racing, pari-mutuel wagering and breeding law is amended by adding a new article 15 to read as follows:

ARTICLE 15

INTERACTIVE GAMING

Section 1500. Legislative findings and purpose.
1501. Definitions.
1502. Authorization.
1503. Required safeguards/minimum standards.
1504. Scope of licensing review.
1505. State tax.
1506. Disposition of taxes.

§ 1500. Legislative findings and purpose. The legislature hereby finds and declares that: 1. Under the New York penal law a person engages in gambling when he or she stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his or her control or influence, upon an agreement or understanding that he or she will receive something of value in the event of a certain outcome.

2. A contest of chance is defined as any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein. (Subdivision 1 of section 225.00 of the penal law). Thus, games of chance may involve some skill, but in those games the level of skill does not determine the outcome regardless of the

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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degree of skill employed. See People v. Turner, 165 Misc. 2d 222, 224, 629 N.Y.S.2d 661, 662 (Crim. Ct. 1995). On the other hand, where a contest pits the skill levels of the players against each other, New York courts have found a game to be one of skill rather than chance. See People v. Hunt, 162 Misc. 2d 70, 72, 616 N.Y.S.2d 168, 170 (Crim. Ct. 1994) ("Played fairly, skill rather than chance is the material component of three-card monte.");

3. Poker in many instances has been defined as a game of skill and a New York federal court in U.S. v. DiCristina, 886 F. Supp. 2d 164, 224, assessed that under federal law poker was predominantly a game of skill;

4. New York courts have interpreted New York law to apply a more rigorous test in identifying a "contest of chance" than is applied by most states in this nation and the courts have found that where a contest pits the skill levels of the players against each other, those games are games of skill and not games of chance. Furthermore, the courts have not limited the legislature's ability to determine that certain forms of poker should fall outside the general definition of gambling since those games are games of skill;

5. Texas Hold'em poker involves two cards dealt face down to each player and then five community cards placed face-up by the dealer, a series of three, then two additional single cards, with players determining whether to check, bet, raise or fold after each deal. Omaha Hold'em poker is a similar game, in which each player is dealt four cards and makes his or her best hand using exactly two of them, plus exactly three of the five community cards. These games are considered to be complex forms of poker which involve player strategy and decision-making and which pit the skill levels of the players against each other. As games of skill, these forms of poker do not fall under the definition of gambling as prohibited by the penal law; and

6. The legislature further finds that as the internet has become an integral part of society, and internet poker a major form of entertainment for many consumers, any interactive gaming enforcement and regulatory structure must begin from the bedrock premise that participation in a lawful and licensed gaming industry is a privilege and not a right, and that regulatory oversight is intended to safeguard the integrity of the games and participants and to ensure accountability and the public trust.

§ 1501. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Authorized game" means Omaha Hold'em and Texas Hold'em poker, as well as any other poker game that the commission determines is the material equivalent of either of those, whether in a cash game or tournament.

2. "Authorized participants" means persons who are either physically present in this state when placing a wager or who otherwise are permitted by applicable law, as determined by the commission, to place a wager. The intermediate routing of electronic data in connection with interactive gaming shall not determine the location or locations in which a wager is initiated, received or otherwise made.

3. "Core function" means any of the following: (a) the management, administration or control of wagers on interactive gaming; (b) the management, administration or control of the games with which those wagers are associated; or (c) the development, maintenance, provision or operation of an interactive gaming platform.

4. "Commission" means the New York state gaming commission.

5. "Division" means the division of gaming, established under paragraph (c) of subdivision two of section one hundred three of this chapter.

6. "Interactive gaming" means the conduct of games through the use of the internet or other communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a wager and corresponding information related to the display of the game, game outcomes or other similar information. The term does not include the conduct of (a) non-gambling games that do not otherwise require a license under state or federal law; or (b) games that occur entirely among participants who are located on a licensed casino premises. For purposes of this provision, "communications technology" means any method used and the components employed by an establishment to facilitate the transmission of information, including, without limitation, transmission and reception by systems based on wire, cable, radio, microwave, light, optics or computer data networks, including, without limitation, the internet and intranets.

7. "Interactive gaming gross revenue" means the total of all sums paid to a licensee from interactive gaming involving authorized participants, less only the total of all sums paid out as winnings to patrons and promotional gaming credits; provided, however, that the cash equivalent value of any merchandise or other non-cash thing of value included in a contest or tournament shall not be included in the total of all sums paid out as winnings to players for purposes of determining interactive gaming gross revenue.

(a) Neither amounts deposited with a licensee for purposes of interactive gaming nor amounts taken in fraudulent acts perpetrated against a licensee for which the licensee is not reimbursed shall be considered to have been "paid" to the licensee for purposes of calculating interactive gaming gross revenue.

(b) "Promotional gaming credit" includes bonuses, promotions and any amount received by a licensee from a patron for which the licensee can demonstrate that it or its affiliate has not received cash.

8. "Interactive gaming platform" means the combination of hardware, software and data networks used to manage, administer or control wagers on interactive gaming or the games with which those wagers are associated.

9. "Internet" means a computer network of interoperable packet-switched data networks.

10. "Licensee" means a person who is licensed by the commission to offer interactive gaming, using an interactive gaming platform to authorized participants. A licensee may utilize multiple interactive gaming platforms provided that each platform is approved by the commission.

11. "Omaha Hold'em poker" means the poker game marketed as Omaha Hold'em poker or Omaha poker in which each player is dealt four cards and must make his or her best hand using exactly two of them, plus exactly three of the five community cards.

12. "Significant vendor" means any person who offers or who proposes to offer any of the following services with respect to interactive gaming: (a) a core function; (b) sale, licensing or other receipt of compensation for selling or licensing a database or customer list of individuals residing in the United States selected in whole or in part because they placed wagers or participated in gambling games with or

through an internet website or operator (or any derivative of such a database or customer list); (c) provision of any trademark, tradename, service mark or similar intellectual property under which a licensee or significant vendor identifies interactive games to customers; or (d) provision of any product, service or asset to a licensee or significant vendor in return for a percentage of interactive gaming revenue (not including fees to financial institutions and payment providers for facilitating a deposit or withdrawal by an authorized participant). The term "significant vendor" shall not include a provider of goods or services to a licensee that are not specifically designed for use and not principally used in connection with interactive gaming.

13. "Texas Hold'em poker" means the type of poker marketed as Texas Hold'em poker that involves two cards being dealt face down to each player and then five community cards being placed face-up by the dealer, a series of three then two additional single cards, with players having the option to check, bet, raise or fold after each deal.

§ 1502. Authorization. 1. The commission shall, within one hundred eighty days of the date this article becomes law, promulgate regulations to implement interactive gaming in this state and shall authorize up to eleven licenses to operate interactive gaming involving authorized participants, subject to the provisions of this article and other applicable provisions of law.

2. Applicants eligible to apply for a license pursuant to this article shall be those entities:

(a) licensed by the state pursuant to section sixteen hundred seventeen-a of the tax law to operate video lottery gaming and has experience in the operation of interactive gaming by being licensed in a state with comparable licensing requirements or guarantees acquisition of adequate business competence and experience in the operation of interactive gaming; or

(b) licensed by the state to operate a class III gaming facility pursuant to article thirteen of this chapter and has experience in the operation of interactive gaming by being licensed in a state with comparable licensing requirements or guarantees acquisition of adequate business competence and experience in the operation of interactive gaming.

3. The commission shall, to the extent practicable, issue licenses to multiple applicants no sooner than one hundred eighty days after the promulgation of regulations in order to ensure a robust and competitive market for consumers and to prevent early licensees from gaining an unfair competitive advantage.

4. No person may operate, manage or make available an interactive gaming platform or act as a significant vendor with respect to interactive gaming that is offered to persons located in this state unless licensed by the commission pursuant to this article and only those games authorized by the commission shall be permitted.

5. License applicants may form a partnership, joint venture or other contractual arrangement in order to facilitate the purposes of this article.

6. Any person found suitable by the commission may be issued a license as an operator or significant vendor pursuant to this article. In determining suitability, the commission shall consider those factors it deems relevant in its discretion, including but not limited to:

(a) Whether the applicant is a person of good character, honesty and integrity;

(b) Whether the applicant is person whose prior activities, criminal record, if any, reputation, habits and associations do not:

(i) pose a threat to the public interest or to the effective regulation and control of interactive gaming; or

(ii) create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of interactive gaming or in the carrying on of the business and financial arrangements incidental to such gaming;

(c) Whether the applicant is capable of and likely to conduct the activities for which the applicant is licensed in accordance with the provisions of this article, any regulations prescribed under this article and all other applicable laws;

(d) Whether the applicant has or guarantees acquisition of adequate business competence and experience in the operation of licensed gaming or of interactive gaming in this state or in a state with comparable licensing requirements; and

(e) Whether the applicant has or will obtain sufficient financing for the nature of the proposed operation and from a suitable source.

7. The commission further shall develop standards by which to evaluate and approve interactive gaming platforms for use with interactive gaming. Interactive gaming platforms must be approved by the commission before being used by a licensee or significant vendor to conduct interactive gaming in this state.

8. The commission shall require all licensees to pay a one-time fee of ten million dollars. Such fee paid by each licensee shall be applied to satisfy, in whole or in part, as applicable, that licensee's tax obligation pursuant to section fifteen hundred five of this article in sixty equal monthly installments, allocated to each of the first sixty months of tax owed after the licensee has begun operating interactive gaming pursuant to this article. No amounts not required to be used to satisfy such tax obligation during that period shall be allocated to payment of such tax obligation after that period.

9. Licenses issued by the commission shall remain in effect for ten years.

10. The commission, by regulation, may authorize and promulgate any rules necessary to implement agreements with other states, or authorized agencies thereof (a) to enable patrons in those states to participate in interactive gaming offered by licensees under this article or (b) to enable patrons in this state to participate in interactive gaming offered by licensees under the laws of those other states, provided that such other state or authorized agency applies suitability standards and review materially consistent with the provisions of this article.

11. Any regulations adopted pursuant to subdivision ten of this section must set forth provisions that address:

(a) Any arrangements to share revenue between New York and any other state or agency within another state; and

(b) Arrangements to ensure the integrity of interactive gaming offered pursuant to any such agreement and the protection of patrons located in this state.

12. The commission may delegate its responsibilities to administer the provisions of this article to the division, as it sees fit, except for its responsibilities to approve licenses.

§ 1503. Required safeguards/minimum standards. The commission shall require licensees to implement measures to meet the standards set out in this section, along with such other standards that the commission in its discretion may choose to require.

(a) Appropriate safeguards to ensure, to a reasonable degree of certainty, that participants in interactive gaming are not younger than twenty-one years of age.

(b) Appropriate safeguards to ensure, to a reasonable degree of certainty, that participants in interactive gaming are physically located within the state or such other jurisdiction that the commission has determined to be permissible.

(c) Appropriate safeguards to protect, to a reasonable degree of certainty, the privacy and online security of participants in interactive gaming.

(d) Appropriate safeguards to ensure, to a reasonable degree of certainty, that the interactive gaming is fair and honest and that appropriate measures are in place to deter, detect and, to the extent reasonably possible, to prevent cheating, including collusion, and use of cheating devices, including use of software programs (sometimes referred to as "bots") that make bets or wagers according to algorithms.

(e) Appropriate safeguards to minimize compulsive gaming and to provide notice to participants of resources to help problem gamblers.

(f) Appropriate safeguards to ensure participants' funds are held in accounts segregated from the funds of licensees and otherwise are protected from corporate insolvency, financial risk or criminal or civil actions against the licensee.

§ 1504. Scope of licensing review. 1. In connection with any license issued pursuant to this article, the licensee, significant vendor or applicant shall identify and the commission shall review the suitability of such licensee's, significant vendor's or applicant's owner, chief executive officer, chief financial officer and any other officer or employee who the commission deems is significantly involved in the management or control of the licensee, significant vendor or applicant or of the interactive gaming platform. "Owner" for purposes of this provision means any person who directly or indirectly holds any beneficial or ownership interest in the applicant of five percent or greater or any amount of ownership that the commission determines to be significant ownership of the licensee, significant vendor, or applicant.

2. Institutional investors are subject to the provisions set out in this section.

(a) An institutional investor holding under twenty-five percent of the equity securities of a licensee's or significant vendor's (or applicant's) holding or intermediary companies, shall be granted a waiver of any investigation of suitability or other requirement if such securities are those of a corporation, whether publicly traded or privately held, and its holdings of such securities were purchased for investment purposes only and it files a certified statement to the effect that it has no intention of influencing or affecting the affairs of the issuer, the licensee (or significant vendor or applicant, as applicable) or its holding or intermediary companies; provided, however, that it shall be permitted to vote on matters put to the vote of the outstanding security holders. The commission may grant such a waiver to an institutional investor holding a higher percentage of such securities upon a showing of good cause and if the conditions specified above are met. Any institutional investor granted a waiver under this paragraph which subsequently determines to influence or affect the affairs of the issuer shall provide not less than thirty days' notice of such intent and shall file with the commission a request for determination of suitability before taking any action that may influence or affect the affairs of the issuer; provided, however, that it shall be permitted to vote on matters

put to the vote of the outstanding security holders. If an institutional investor changes its investment intent, or if the commission finds reasonable cause to believe that the institutional investor may be found unsuitable, no action other than divestiture shall be taken by such investor with respect to its security holdings until there has been compliance with any requirements established by the commission, which may include the execution of a trust agreement. The licensee (or significant vendor or applicant, as applicable) and its relevant holding, intermediary or subsidiary company shall notify the commission immediately of any information about, or actions of, an institutional investor holding its equity securities where such information or action may impact upon the eligibility of such institutional investor for a waiver pursuant to this paragraph.

(b) If at any time the commission finds that an institutional investor holding any security of a holding or intermediary company of a licensee or significant vendor or applicant, or, where relevant, of another subsidiary company of a holding or intermediary company of a licensee or significant vendor or applicant which is related in any way to the financing of the licensee or significant vendor or applicant, fails to comply with the terms of paragraph (a) of this section, or if at any time the commission finds that, by reason of the extent or nature of its holdings, an institutional investor is in a position to exercise such a substantial impact upon the controlling interests of a licensee or significant vendor or applicant that investigation and determination of suitability of the institutional investor is necessary to protect the public interest, the commission may take any necessary action otherwise authorized under this article to protect the public interest.

(c) For purposes of this section, an "institutional investor" shall mean any retirement fund administered by a public agency for the exclusive benefit of federal, state, or local public employees; investment company registered under the Investment Company Act of 1940 (15 U.S.C. § 80a-1 et seq.); collective investment trust organized by banks under Part Nine of the Rules of the Comptroller of the Currency; closed end investment trust; chartered or licensed life insurance company or property and casualty insurance company; banking and other chartered or licensed lending institution; investment advisor registered under The Investment Advisors Act of 1940 (15 U.S.C. § 80b-1 et seq.); and such other persons as the commission may determine for reasons consistent with the public interest.

§ 1505. State tax. Licensees engaged in the business of conducting interactive gaming pursuant to this article shall pay a privilege tax based on the licensee's interactive gaming gross revenue at a fifteen percent rate.

§ 1506. Disposition of taxes. The commission shall pay into the state lottery fund all taxes imposed by this article; any interest and penalties imposed by the commission relating to those taxes; all penalties levied and collected by the commission; and the appropriate funds, cash or prizes forfeited from interactive gaming.

§ 2. Subdivision 1 of section 225.00 of the penal law is amended to read as follows:

1. "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends [~~in a material degree~~] **predominantly** upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

§ 3. The penal law is amended by adding a new section 225.36 to read as follows:

§ 225.36 Interactive gaming offenses and exceptions.

1. The knowing and willful offering of unlicensed interactive gaming to persons in this state, or the knowing and willful provision of services with respect thereto, shall constitute a gambling offense under this article.

2. Licensed interactive gaming activities under section fifteen hundred two of the racing, pari-mutuel wagering and breeding law shall not be a gambling offense under this article.

3. A person offering unlicensed interactive gaming to persons in this state shall be liable for all taxes set forth in section fifteen hundred five of the racing, pari-mutuel wagering and breeding law in the same manner and amounts as if such person were a licensee. Timely payment of such taxes shall not constitute a defense to any prosecution or other proceeding in connection with the interactive gaming except for a prosecution or proceeding alleging failure to make such payment.

§ 4. Severability clause. If any provision of this act or application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be confined in its operation to the provision thereof directly involved in the controversy in which the judgment shall have been rendered.

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law.