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Introduced by Sens. BONACIC, AVELLA -- read twice and ordered printed, and when printed to be committed to the Committee on Racing, Gaming and Wagering -- reported favorably from said committee and committed to the Committee on Finance -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

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:

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

ARTICLE 15

INTERACTIVE GAMING

Section 1500. Legislative findings and purpose.

6 1501. Definitions.

7 1502. Authorization.

8 1503. Required safeguards/minimum standards.

9 1504. Scope of licensing review.

10 1505. State tax.

11 1506. Disposition of taxes.

12 § 1500. Legislative findings and purpose. The legislature hereby finds
13 and declares that: 1. Under the New York penal law a person engages in
14 gambling when he or she stakes or risks something of value upon the
15 outcome of a contest of chance or a future contingent event not under
16 his or her control or influence, upon an agreement or understanding that
17 he or she will receive something of value in the event of a certain
18 outcome.

19 2. A contest of chance is defined as any contest, game, gaming scheme
20 or gaming device in which the outcome depends in a material degree upon
21 an element of chance, notwithstanding that skill of the contestants may
22 also be a factor therein. (Subdivision 1 of section 225.00 of the penal
23 law). Thus, games of chance may involve some skill, but in those games

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

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1 the level of skill does not determine the outcome regardless of the
2 degree of skill employed. See People v. Turner, 165 Misc. 2d 222, 224,
3 629 N.Y.S.2d 661, 662 (Crim. Ct. 1995). On the other hand, where a
4 contest pits the skill levels of the players against each other, New
5 York courts have found a game to be one of skill rather than chance. See
6 People v. Hunt, 162 Misc. 2d 70, 72, 616 N.Y.S.2d 168, 170 (Crim. Ct.
7 1994) ("Played fairly, skill rather than chance is the material compo-
8 nent of three-card monte.");

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

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

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

31 6. The legislature further finds that as the internet has become an
32 integral part of society, and internet poker a major form of enter-
33 tainment for many consumers, any interactive gaming enforcement and
34 regulatory structure must begin from the bedrock premise that partic-
35 ipation in a lawful and licensed gaming industry is a privilege and not
36 a right, and that regulatory oversight is intended to safeguard the
37 integrity of the games and participants and to ensure accountability and
38 the public trust.

39 § 1501. Definitions. As used in this article, the following terms
40 shall have the following meanings:

41 1. "Authorized game" means Omaha Hold'em and Texas Hold'em poker, as
42 well as any other poker game that the commission determines is the mate-
43 rial equivalent of either of those, whether in a cash game or tourna-
44 ment.

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

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

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

1 5. "Covered asset" means any of the following categories of assets if
2 used in connection with the knowing and willful acceptance of any wager
3 from persons located in the United States of any form of interactive
4 gaming (including but not limited to poker) after December thirty-first,
5 two thousand six, that has not been affirmatively authorized by law of
6 the United States or of each state in which persons making such wager
7 were located: (a) any trademark, trade name, service mark or similar
8 intellectual property that was used to identify any aspect of the inter-
9 net website or of the operator offering the wagers or games to its
10 patrons; (b) any database or customer list of individuals residing in
11 the United States who placed such wagers; (c) any derivative of a data-
12 base or customer list described in paragraph (b) of this subdivision; or
13 (d) an asset used to provide a core function.

14 6. "Division" means the division of gaming, established under para-
15 graph (c) of subdivision two of section one hundred three of this chap-
16 ter.

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

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

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

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

49 9. "Interactive gaming platform" means the combination of hardware,
50 software and data networks used to manage, administer or control wagers
51 on interactive gaming or the games with which those wagers are associ-
52 ated.

53 10. "Internet" means a computer network of interoperable packet-
54 switched data networks.

55 11. "Licensee" means a person who is licensed by the commission to
56 offer interactive gaming, using an interactive gaming platform to

1 authorized participants. A licensee may utilize multiple interactive
2 gaming platforms provided that each platform is approved by the commis-
3 sion.

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

8 13. "Significant vendor" means any person who offers or who proposes
9 to offer any of the following services with respect to interactive
10 gaming: (a) a core function; (b) sale, licensing or other receipt of
11 compensation for selling or licensing a database or customer list of
12 individuals residing in the United States selected in whole or in part
13 because they placed wagers or participated in gambling games with or
14 through an internet website or operator (or any derivative of such a
15 database or customer list); (c) provision of any trademark, tradename,
16 service mark or similar intellectual property under which a licensee or
17 significant vendor identifies interactive games to customers; or (d)
18 provision of any product, service or asset to a licensee or significant
19 vendor in return for a percentage of interactive gaming revenue (not
20 including fees to financial institutions and payment providers for
21 facilitating a deposit or withdrawal by an authorized participant). The
22 term "significant vendor" shall not include a provider of goods or
23 services to a licensee that are not specifically designed for use and
24 not principally used in connection with interactive gaming.

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

30 § 1502. Authorization. 1. The commission shall, within one hundred
31 eighty days of the date this article becomes law, promulgate regulations
32 to implement interactive gaming in this state and shall authorize up to
33 eleven licenses to operate interactive gaming involving authorized
34 participants, subject to the provisions of this article and other appli-
35 cable provisions of law.

36 2. Applicants eligible to apply for a license as an operator pursuant
37 to this article shall be those entities:

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

44 (b) licensed by the state to operate a class III gaming facility
45 pursuant to article thirteen of this chapter and has experience in the
46 operation of interactive gaming by being licensed in a state with compa-
47 rable licensing requirements or guarantees acquisition of adequate busi-
48 ness competence and experience in the operation of interactive gaming.

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

54 4. No person may operate, manage or make available an interactive
55 gaming platform or act as a significant vendor with respect to interac-
56 tive gaming that is offered to persons located in this state unless

1 licensed by the commission pursuant to this article and only those games
2 authorized by the commission shall be permitted.

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

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

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

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

14 (i) pose a threat to the public interest or to the effective regu-
15 lation and control of interactive gaming; or

16 (ii) create or enhance the dangers of unsuitable, unfair or illegal
17 practices, methods and activities in the conduct of interactive gaming
18 or in the carrying on of the business and financial arrangements inci-
19 dental to such gaming;

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

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

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

30 (f) Whether the applicant:

31 (i) has at any time, either directly, or through another person whom
32 it owned, in whole or in significant part, or controlled:

33 (A) knowingly and willfully accepted or made available wagers on
34 interactive gaming (including poker) from persons located in the United
35 States after December thirty-first, two thousand six, unless such wagers
36 were affirmatively authorized by law of the United States or of each
37 state in which persons making such wagers were located; or

38 (B) knowingly facilitated or otherwise provided services with respect
39 to interactive gaming (including poker) involving persons located in the
40 United States for a person described in clause (A) of this subparagraph
41 and acted with knowledge of the fact that such wagers or interactive
42 gaming involved persons located in the United States; or

43 (ii) has purchased or acquired, directly or indirectly, in whole or in
44 significant part, a person described in subparagraph (i) of this para-
45 graph or will use that person or a covered asset in connection with
46 interactive gaming licensed pursuant to this article.

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

52 8. The commission shall require all licensees to operate interactive
53 gaming to pay a one-time fee of ten million dollars. Such fee paid by
54 each licensee shall be applied to satisfy, in whole or in part, as
55 applicable, that licensee's tax obligation pursuant to section fifteen
56 hundred five of this article in sixty equal monthly installments, allo-

1 cated to each of the first sixty months of tax owed after the licensee
2 has begun operating interactive gaming pursuant to this article. No
3 amounts not required to be used to satisfy such tax obligation during
4 that period shall be allocated to payment of such tax obligation after
5 that period.

6 9. Licenses to operate interactive gaming issued by the commission
7 shall remain in effect for ten years.

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

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

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

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

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

26 § 1503. Required safeguards/minimum standards. The commission shall
27 require licensees to implement measures to meet the standards set out in
28 this section, along with such other standards that the commission in its
29 discretion may choose to require.

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

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

37 (c) Appropriate safeguards to protect, to a reasonable degree of
38 certainty, the privacy and online security of participants in interac-
39 tive gaming.

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

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

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

52 § 1504. Scope of licensing review. 1. In connection with any license
53 issued pursuant to this article, the licensee, significant vendor or
54 applicant shall identify and the commission shall review the suitability
55 of such licensee's, significant vendor's or applicant's owner, chief
56 executive officer, chief financial officer and any other officer or

1 employee who the commission deems is significantly involved in the
2 management or control of the licensee, significant vendor or applicant
3 or of the interactive gaming platform. "Owner" for purposes of this
4 provision means any person who directly or indirectly holds any benefi-
5 cial or ownership interest in the applicant of five percent or greater
6 or any amount of ownership that the commission determines to be signif-
7 icant ownership of the licensee, significant vendor, or applicant.

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

10 (a) An institutional investor holding under twenty-five percent of the
11 equity securities of a licensee's or significant vendor's (or appli-
12 cant's) holding or intermediary companies, shall be granted a waiver of
13 any investigation of suitability or other requirement if such securities
14 are those of a corporation, whether publicly traded or privately held,
15 and its holdings of such securities were purchased for investment
16 purposes only and it files a certified statement to the effect that it
17 has no intention of influencing or affecting the affairs of the issuer,
18 the licensee (or significant vendor or applicant, as applicable) or its
19 holding or intermediary companies; provided, however, that it shall be
20 permitted to vote on matters put to the vote of the outstanding security
21 holders. The commission may grant such a waiver to an institutional
22 investor holding a higher percentage of such securities upon a showing
23 of good cause and if the conditions specified above are met. Any insti-
24 tutional investor granted a waiver under this paragraph which subse-
25 quently determines to influence or affect the affairs of the issuer
26 shall provide not less than thirty days' notice of such intent and shall
27 file with the commission a request for determination of suitability
28 before taking any action that may influence or affect the affairs of the
29 issuer; provided, however, that it shall be permitted to vote on matters
30 put to the vote of the outstanding security holders. If an institutional
31 investor changes its investment intent, or if the commission finds
32 reasonable cause to believe that the institutional investor may be found
33 unsuitable, no action other than divestiture shall be taken by such
34 investor with respect to its security holdings until there has been
35 compliance with any requirements established by the commission, which
36 may include the execution of a trust agreement. The licensee (or signif-
37 icant vendor or applicant, as applicable) and its relevant holding,
38 intermediary or subsidiary company shall notify the commission imme-
39 diately of any information about, or actions of, an institutional inves-
40 tor holding its equity securities where such information or action may
41 impact upon the eligibility of such institutional investor for a waiver
42 pursuant to this paragraph.

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

1 (c) For purposes of this section, an "institutional investor" shall
2 mean any retirement fund administered by a public agency for the exclu-
3 sive benefit of federal, state, or local public employees; investment
4 company registered under the Investment Company Act of 1940 (15 U.S.C. §
5 80a-1 et seq.); collective investment trust organized by banks under
6 Part Nine of the Rules of the Comptroller of the Currency; closed end
7 investment trust; chartered or licensed life insurance company or prop-
8 erty and casualty insurance company; banking and other chartered or
9 licensed lending institution; investment advisor registered under The
10 Investment Advisors Act of 1940 (15 U.S.C. § 80b-1 et seq.); and such
11 other persons as the commission may determine for reasons consistent
12 with the public interest.

13 § 1505. State tax. Licensees engaged in the business of conducting
14 interactive gaming pursuant to this article shall pay a privilege tax
15 based on the licensee's interactive gaming gross revenue at a fifteen
16 percent rate.

17 § 1506. Disposition of taxes. The commission shall pay into the state
18 lottery fund all taxes imposed by this article; any interest and penal-
19 ties imposed by the commission relating to those taxes; all penalties
20 levied and collected by the commission; and the appropriate funds, cash
21 or prizes forfeited from interactive gaming.

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

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

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

30 § 225.36 Interactive gaming offenses and exceptions.

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

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

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

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

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