

STATE OF NEW YORK

1668

2021-2022 Regular Sessions

IN ASSEMBLY

January 11, 2021

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Racing 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:

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.

1501. Definitions.

1502. Authorization.

1503. Required safeguards/minimum standards.

1504. Scope of licensing review.

1505. State tax.

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
24 the level of skill does not determine the outcome regardless of the
25 degree of skill employed. See People v. Turner, 165 Misc. 2d 222, 224,

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

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1 629 N.Y.S.2d 661, 662 (Crim. Ct. 1995). On the other hand, where a
2 contest pits the skill levels of the players against each other, New
3 York courts have found a game to be one of skill rather than chance. See
4 People v. Hunt, 162 Misc. 2d 70, 72, 616 N.Y.S.2d 168, 170 (Crim. Ct.
5 1994) ("Played fairly, skill rather than chance is the material compo-
6 nent of three-card monte.");

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

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

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

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

37 § 1501. Definitions. As used in this article, the following terms
38 shall have the following meanings:

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

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

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

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

1 5. "Division" means the division of gaming, established under para-
2 graph (c) of subdivision two of section one hundred three of this chap-
3 ter.

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

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

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

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

36 8. "Interactive gaming platform" means the combination of hardware,
37 software and data networks used to manage, administer or control wagers
38 on interactive gaming or the games with which those wagers are associ-
39 ated.

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

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

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

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

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

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

17 § 1502. Authorization. 1. The commission shall, within one hundred
18 eighty days of the date this article becomes law, promulgate regulations
19 to implement interactive gaming in this state and shall authorize up to
20 eleven licenses to operate interactive gaming involving authorized
21 participants, subject to the provisions of this article and other appli-
22 cable provisions of law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

51 § 1503. Required safeguards/minimum standards. The commission shall
52 require licensees to implement measures to meet the standards set out in
53 this section, along with such other standards that the commission in its
54 discretion may choose to require.

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

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

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

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

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

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

23 § 1504. Scope of licensing review. 1. In connection with any license
24 issued pursuant to this article, the licensee, significant vendor or
25 applicant shall identify and the commission shall review the suitability
26 of such licensee's, significant vendor's or applicant's owner, chief
27 executive officer, chief financial officer and any other officer or
28 employee who the commission deems is significantly involved in the
29 management or control of the licensee, significant vendor or applicant
30 or of the interactive gaming platform. "Owner" for purposes of this
31 provision means any person who directly or indirectly holds any benefi-
32 cial or ownership interest in the applicant of five percent or greater
33 or any amount of ownership that the commission determines to be signif-
34 icant ownership of the licensee, significant vendor, or applicant.

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

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

1 put to the vote of the outstanding security holders. If an institutional
2 investor changes its investment intent, or if the commission finds
3 reasonable cause to believe that the institutional investor may be found
4 unsuitable, no action other than divestiture shall be taken by such
5 investor with respect to its security holdings until there has been
6 compliance with any requirements established by the commission, which
7 may include the execution of a trust agreement. The licensee (or signif-
8 icant vendor or applicant, as applicable) and its relevant holding,
9 intermediary or subsidiary company shall notify the commission imme-
10 diately of any information about, or actions of, an institutional inves-
11 tor holding its equity securities where such information or action may
12 impact upon the eligibility of such institutional investor for a waiver
13 pursuant to this paragraph.

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

28 (c) For purposes of this section, an "institutional investor" shall
29 mean any retirement fund administered by a public agency for the exclu-
30 sive benefit of federal, state, or local public employees; investment
31 company registered under the Investment Company Act of 1940 (15 U.S.C. §
32 80a-1 et seq.); collective investment trust organized by banks under
33 Part Nine of the Rules of the Comptroller of the Currency; closed end
34 investment trust; chartered or licensed life insurance company or prop-
35 erty and casualty insurance company; banking and other chartered or
36 licensed lending institution; investment advisor registered under The
37 Investment Advisors Act of 1940 (15 U.S.C. § 80b-1 et seq.); and such
38 other persons as the commission may determine for reasons consistent
39 with the public interest.

40 § 1505. State tax. Licensees engaged in the business of conducting
41 interactive gaming pursuant to this article shall pay a privilege tax
42 based on the licensee's interactive gaming gross revenue at a fifteen
43 percent rate.

44 § 1506. Disposition of taxes. The commission shall pay into the state
45 lottery fund all taxes imposed by this article; any interest and penal-
46 ties imposed by the commission relating to those taxes; all penalties
47 levied and collected by the commission; and the appropriate funds, cash
48 or prizes forfeited from interactive gaming.

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

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

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

1 § 225.36 Interactive gaming offenses and exceptions.

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

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

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

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

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