



Photo: Doug Kerr (flickr.com/dougkerr)

The road to regulation

Gaming law attorney **John K. Maloney** gives his take on the rights and wrongs of the latest attempt to legalise online poker in California

California is one of the largest economies in the entire world, which makes it fertile ground for regulated interactive poker. Because of California's potential, as well as the state's legitimate interest and concern in how online poker comes to be operated and regulated, thoughtful legislation will be needed for California to thrive within the interactive market.

While the issue of legalising intrastate online poker in California has been debated for well over six years, many are optimistic that it will be legalised during the 2015 legislative session. In the 2014 legislative session, AB 2291 and SB 1366 were introduced, and while unsuccessful, they laid the foundation for AB 9, introduced in December 2014. It is likely that companion bills to AB 9 will be introduced as well. For

the most part, these proposals provide a good foundation for California's online poker market. However, the same issues contained in AB 2291 and SB 1366 are still present in AB 9.

LANGUAGE

Last session, two controversial provisions of the online poker legislation pertained to the inclusion of bad actor language and the exclusion of the racetracks. More than anything, both provisions appeared rooted in anti-competition, which is an improper approach to this legislation. The focus of internet poker legislation should not be on excluding certain groups to protect local operators, but at least in part focused on attracting entities with the know-how to operate a regulatory compliant platform.

Unfortunately, following in the footsteps of the prior bills, AB 9 includes bad actor language and excludes the racetracks.

EXCLUSIONARY LANGUAGE

After the 2014 session, it was anticipated that the bad actor language seeking to exclude certain operators would be included in the next proposed version/version of the internet poker legislation. As was expected, a new version, containing this same unnecessary language was introduced in December 2014.

AB 9 would prohibit certain operators from even applying for licensure if those operators continued to accept bets from players in the United States, or knowingly facilitated or provided services with respect to bets or gambling games using the internet, after the Unlawful Internet Gambling Enforcement Act (UIGEA) was passed in 2006. This language automatically makes such operators unsuitable to hold a licence.

Further, AB 9 also includes "covered assets" language, which would make a third-party applicant unsuitable if that applicant purchased or acquired the covered assets (broadly defined) of any entity described in the other exclusionary provisions. This type of language does not take into account the fact that people make bad decisions, assets do not. For example, brands

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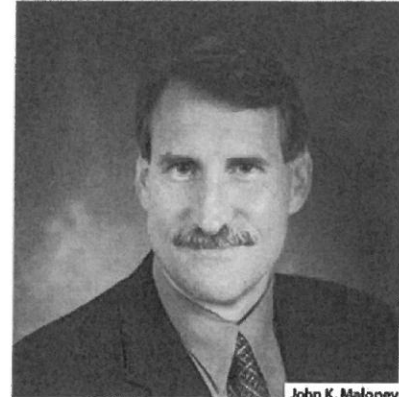
are bought and sold every day. This language ignores any remedial or restructuring actions that may have been taken by a company to rehabilitate. While the legislation contains a waiver provision, that provision creates a seemingly impossible burden for an applicant to meet in order to waive the bad actor or covered assets provisions.

California should not have a system where suitability is determined by politicians and lobbyists. As long as any similar predetermined suitability language is included in online poker legislation, special interests will be dominating in an area they have no business influencing. The arguments in support of this language miss the purpose of the Gambling Control Act. California has implemented this two-tier bifurcated system so that the regulators are the ones determining suitability. Some supporters of the bad actor language argue that it is necessary to protect the consumer. But given the authority of the regulators, the current regulations and proposed internal controls in AB 9 (and AB 2291 and SB 1366), there is no merit to that argument. Within this privileged

regulators should be provided an objective analysis for a determination of suitability.

RACETRACK LANGUAGE

One issue that has the potential to delay this legislation before and after its passage into law is the inclusion of the racetracks. Including the racetracks in the online poker legislation has been a back and forth issue. The racetracks want to participate and operate an online poker site, but other groups see things differently. In AB 2291 and SB 1366, the racetracks were not included, but they were in prior legislation. In AB 9, they are not included. The primary reason for the recent exclusion appears to be the lobbying efforts by those who believe that expanding the legislation to include racetracks violates tribal casino exclusivity granted by the State Constitution. Based upon various public comments made by those involved, the tribes are split on that justification. Some tribes have no issue with the racetracks being included, while other tribes see their inclusion as a non-starter. Representatives for the racetracks have



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in order to remain secure, competitive and attractive to businesses.

While the regulators are still guided by the same suitability and investigative standards in their approach, the current legislation (and any companion legislation) should include new and specific technical requirements and internal controls so that regulators can identify compliant and non-compliant platforms and software.

Regulators in California have backgrounds ranging from law enforcement to finance, and while they are more than capable of enforcing the new law, the additional task of enforcing internet gaming regulations is significant. As a result, their current regulatory approach will need to be modified with detailed procedures and training in order to keep the interactive platforms and operators compliant. This could be accomplished with new training programmes, supplemental regulations, additional employees or the creation of a designated interactive division within the Bureau.

BOTTOM LINE

California needs an online gaming framework that works for California and is adept at addressing the state-specific challenges. While AB 2291 and SB 1366 provided a good foundation last session, each contained flaws and issues that are still present in the latest online poker legislation. These issues, especially the anti-competitive sentiment underlying various provisions, will need to be addressed and resolved if the legislation is to create an infrastructure that works for California. For California to succeed on an intrastate basis, legislators need to be guided by principles of consumer and operator protection, and leave the issue of access and suitability to the regulators. Should that occur, California is likely to be the fourth US state to enter the online interactive space. ◀

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industry, there is a necessary investigatory and suitability process that must take place by the regulators, and no applicant is guaranteed a licence at the conclusion of that process.

For California's online industry to succeed and not be marginalised, the regulators must maintain the sole authority in determining suitability. The current regulations provide enormous discretion for regulators to capture and encompass any applicant in the interactive space that should not hold a licence. The new legislation essentially replicates the same provisions in AB 2291 and SB 1366 with regards to regulatory discretion in determining suitability in the interactive space. As a result, including bad actor and covered asset language is redundant and unnecessary, and only demonstrates a desire by competitors to eliminate future competition from the market. California needs to embrace applicants with proven technology and institutional knowledge, as it will benefit and grow the entire online industry. If California does not embrace these types of potential applicants by providing them a meaningful opportunity at licensure, they will likely come to compete with their technology in other jurisdictions and/or offshore. Legislators need to understand that any applicant willing to accept the risk of full disclosure to the

publicly stated that if excluded they may seek remedies through the courts, as they believe there is no legal basis for keeping them out of the online poker legislation.

IMPLEMENTATION AND TECHNICAL COMPLIANCE

The interactive gaming space is relatively unknown in the United States, which has the potential to make it vulnerable if certain technical standards and internal controls are not in place. As a result, both the internal systems and those tasked with understanding the intricacies of them are crucial to California's online gambling industry. Because of how large California's market would be, the state will need to implement a system with a certain level of predictability and stability.

In terms of technical standards, the requirements from AB 9, AB 2291 and SB 1366 seem to provide a good starting point for the framework of California's interactive infrastructure and internal controls. The technical standards in each appear to be a combination of other jurisdictions' technical standards and policies. It is promising to see California incorporate many of the same domestic and international standards and policies, as this is what this industry will need