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The deployment of skins in Pennsylvania's new online gaming market

With the enactment of amendments to the Pennsylvania Race Horse Development and Gaming Act in late October 2017, Pennsylvania became the fourth state to offer legalised online gaming in the US. Implementation of the new Expanded Gaming Act has been given to the Pennsylvania Gaming Control Board, which is tasked with handling a range of issues under the Expanded Gaming Act, including how Pennsylvania treats 'skins,' and the Board has now issued temporary regulations on the state's policy towards skins. Stephen D. Schrier, Partner and Co-Chair of the Gaming Practice at Blank Rome LLP, discusses here the deployment of skins in Pennsylvania's new online gaming market, among other issues relating to the implementation of the new legislation.

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In October 2017, a crack finally appeared in the dam confining US online gaming to three states. Four years after the launch of New Jersey's first online casinos, the Commonwealth of Pennsylvania expanded its brick and mortar casino gaming with several new options, the most anticipated being full scale internet casino and poker offered statewide. These provisions were part of sweeping amendments to the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§ 1101 et seq. (the 'Gaming Act') comprising 939 pages, and are known as 'Act 42' or the 'Expanded Gaming Act.' In typical fashion, the Pennsylvania General Assembly passed the law, but left the implementation to the Pennsylvania Gaming Control Board (the 'Board') and its staff. To their credit, they have been pedaling furiously toward the launch.

Borrowing heavily from the New Jersey model, Pennsylvania has tethered online or 'interactive' gaming to its existing casino licence holders, who are entitled to the first option on a limited number of interactive 'certificates.' These certificates are divided into three categories - casino table games, casino slot games and peer to peer poker, with each certificate priced at \$4 million. A Pennsylvania ('PA') licensed casino may obtain all three certificates during the first 90 days for a total of \$10 million. After that period, each certificate holder must pay \$4 million.

Significantly different from the New Jersey model is the potential for a non-casino operator in PA, who is properly licensed elsewhere (known as a 'Qualified Gaming Entity' or 'QGE'), to obtain an untethered online certificate

if all the interactive certificates are not acquired by PA casinos within 120 days of being offered. Due to the cost and differing business views of the casino operators, there is the strong possibility that unbid certificates can be obtained by outside gaming companies or online gaming operators that meet the qualification standards. If a QGE is selected to be a certificate holder, the QGE then must apply for a licence and be found qualified under the standards for licensure set by the Board. These standards are similar to those of a casino and gaming manufacturer in PA, or a casino service industry enterprise in New Jersey.

The complexity of the certificates, the tax structure, and the ability to bid for them requires careful evaluation from a business perspective. The state tax rate on interactive table games is 16%; poker is 16%; and slots is a whopping 54% (which essentially mirrors the land based rate). Should there be more applicants than certificates available, the Board is delegated the authority to choose a method to select the finalists. Assuming that certificates become available to independent QGEs after 120 days, the Board must then determine how to award these open certificates, who qualifies, and when to award them. Because the period set for existing casino operators to obtain certificates has not yet run, those decisions have not been made. It is likely that a random selection process could be used for the remaining interactive certificate applicants, but that process is not likely to include a bidding war because the cost of a certificate is set by law at \$4 million.

The Board's challenge will be how to award these certificates if there are more QGEs than remaining certificates.

The most highly debated area of discussion in Pennsylvania's new law involves the deployment of 'skins.' The Expanded Gaming Act language was extremely vague regarding the skins question, and that policy has been left to the Board.

Much to the delight of independent online gaming operators in the US and in foreign jurisdictions, the Board proffered temporary regulations ('Regulations') which provided for an 'unlimited' number of skins for each certificate holder, seemingly opening the universe for online gaming operators to team up with land based casino operators while preserving their unique brands, promotions, and database marketing. The temporary Regulations define a 'skin' as the 'portal or portals to an interactive gaming platform or interactive gaming website through which authorized interactive games are made available by an interactive gaming certificate holder or interactive gaming operator to registered players [...].' On 4 April 2018, the Board's Executive Director, Kevin O'Toole, issued the new Regulations, and announced that they were designed to "enable a very open and competitive market for internet gaming while at the same time assuring transparency and accountability for the consumers."

Initially appearing encouraging to the online gaming community, the bubble deflated a bit when the 'small print'

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continued

was read. Under the Regulations, while multiple skins could be hosted by a casino certificate holder, a skin operator cannot offer games ‘independent from an interactive gaming certificate holder and the interactive gaming certificate holder’s webpage or the interactive certificate holder’s organizational structure.’ Further, the Regulations required that all skins must ‘at all times, clearly identify the interactive gaming certificate holder or an entity within the certificate holder’s organizational structure, on the display screen visible to players.’

As a result, a skin operator could operate an online wagering site, but seemingly be required to direct its customers to the casino operator’s website first, not its own portal. This led to confusion about how a skin operator could protect its player acquisition, promotions and database from melding with that of its potential competitor, the certificate holder (or other skins on that site). Assessing the business benefit of a skin operator spending advertising dollars in the very large geographic state of Pennsylvania, only to have a potential player be ‘directed to’ the certificate holder’s website - where they might be tempted by other skins and offerings, or better promotions - was challenging.

Online gaming companies, already faced with significant taxes, licence and investigative fees, would be hard pressed to justify spending the necessary marketing funds to only be offered a chance that the players they enticed would actually wager with them.

These many questions resulted in the already overworked Board staff issuing guidance on 30 April 2018, attempting to clarify its goals and provide support for the promise of transparency and competition. This guidance states:

- “Clear and prominent display’ includes, at a minimum, **identifying the interactive gaming certificate holder in the URL/web address AND clear branding on the interactive gaming site or interactive gaming application operated on behalf of the interactive gaming certificate holder** that identifies the interactive gaming certificate holder. For instance, an interactive gaming website or app offered by an interactive gaming operator or skin should include the name of the certificate holder.
- [...] There are no restrictions on how interactive gaming operators (platform providers) operating on behalf of interactive gaming certificate holders provide access to their skins (e.g. links from different webpages or apps) so long as it is at all times clear to the player that the interactive gaming site is being offered on behalf of the interactive gaming certificate holder. For example, **an interactive gaming operator may link from its webpage, an intermediary webpage or app to the certificate holder branded website it operates on behalf of the certificate holder so long as the certificate holder is clearly identified on the webpage, link, app and landing site.** Advertising by an interactive gaming operator of the games offered on its platform should identify the interactive gaming certificate holder on whose behalf the games are offered, and may direct an individual how to access the platform and register for an account. (Emphasis added)’

In essence, the Board seems to be saying that they are willing to let the parties and the marketplace decide how to structure access by players to their websites, so long as the offerings meet the technical requirements - clear notice of which casino certificate holder is

involved, both on the wagering site and in the URL. Beyond that, the Board will allow the skin operator and certificate holder to make their own agreements on how their relationship will work. This leaves open a multitude of options. One casino certificate holder may not want to operate an interactive casino at all, but will obtain the certificates and agree to let ‘ABC’ online operator manage the entire process - even allowing ‘ABC’ to add other skins on its own terms and at its own discretion - in exchange for a fee or share.

Other casino certificate holders may wish to only have their own branded interactive casino, with no outside brands or skins. Strategically, a QGE may wish to wait until all initial certificates are accounted for and seek its own, thereby avoiding the requirements to team with and identify a casino. The Regulations are flexible enough to permit a certificate holder or online operator to create an organisational structure that fulfills its ‘management philosophy’ about its business relationship with a skin operator, as long as it also meets the Board’s technical requirements. Thus, the possibilities for agreeing to terms between online gaming operators and PA certificate holders would seem as endless as the creativity of the parties. As in all regulated markets, the contract terms are subject to review and approval by the Board, and it is always wise to obtain buy-in from the regulator before finalising the agreement.

In conclusion, this is the pre-dawn hours of Pennsylvania’s day in the sun for online gaming. The next six months should bring the opportunities for US and foreign online companies to succeed into greater focus. Undoubtedly, other US states are closely watching and waiting in the wings.