

Setting the standard

Online gaming attorney David Fried argues that the latest California online poker bill sets the standard when it comes to suitability, and why that could cause headaches for PokerStars

California is now considering two internet gaming bills, one for fantasy sports and the other for online poker. The bills are authored by Assemblyman Adam Gray, who chairs the Assembly Government Organization Committee and is a skilled legislator. Each bill raises a question about the suitability of some applicants: whether those companies or their successors who have in the past, or are still, operating illegally should be considered for licensure.

The issue has been more fully vetted with respect to internet poker, which has languished in the California legislature for years. As an example, in prior testimony before the Assembly Committee on internet poker, two alternative defenses were presented for why legislation should not preclude the participation of PokerStars.

An attorney for one of PokerStars' prospective California partners argued that the operator was not convicted of any crime. A PokerStars spokesperson also insisted the firm had done nothing wrong. Both statements are flawed, albeit for different reasons. The second statement is factually wrong; the first illustrates what is sometimes overlooked in the policy debates.

In most American licensing jurisdictions including California, the test for gambling license suitability is clearly more than just whether you have a criminal record. Suitability asks whether someone is qualified to hold a gambling license based upon their history of compliance with laws, their current compliance with laws, their honesty, integrity and associations. The test is whether you are trustworthy enough to participate in controlled gambling, so that there is no danger of unsuitable, unfair or illegal practices, methods or activities.



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Bad actors

Understood this way, the argument, “we have not been convicted of anything,” does not answer whether you are suitable. But understanding the suitability test also reveals that our “bad actor” debate in California has been arbitrarily constrained in other ways. For poker, much of the debate has focused on “bad actors” who continued to take US customers post-UIGEA and until 2011, like PokerStars. But suitability is not limited by time or geography.

What is often overlooked is that there are companies that currently offer (or have offered) internet gambling without licenses in jurisdictions where internet gambling is not authorized or is explicitly prohibited, but there is an absence of prosecution.

In Australia, the Federal Interactive Gambling Act of 2001 prohibits “interactive gambling”, i.e. online casino and poker games. The government asked Apple to remove online gambling apps from the App Store, including PokerStars' mobile app. But Stars continued to take customers from Australia through its website. A gambling operator may argue that because their servers are outside these countries, they do not have to comply with the gambling laws where the players are located. This is the same unconvincing argument made before about the US market.

The New Jersey Division of Gaming Enforcement report on PokerStars termed these “jurisdictions in which there is no in-country regulatory regime, where the in-country regulatory regime does not apply to internet gaming, or where the applicable law concerning internet gaming is unclear. These jurisdictions include Russia, Canada, Brazil, Australia, Switzerland and Norway.” There is no mention of whether these jurisdictions themselves regard their laws as unclear even if there is an absence of prosecution.

Requiring an applicant for a gaming license to run a “clean” business is not an onerous requirement. Moreover, the California online poker legislation uniquely requires that an operator applicant have been in “good standing” for five years, meaning the applicant's license was not revoked or suspended. Shouldn't “good standing” also include the service providers actually operating the games and managing the system? And shouldn't good standing mean that you actually obtained a license where one was required, and that you ceased operating internet gambling where you had noticed it was prohibited whether or not you have been prosecuted? I certainly think so. ■