MEMORANDUM
Via Email (selloyan@gcb.nv.gov)

date: April 12, 2013

to: Nevada Gaming Commission
Sally P. Elloyan, Executive Secretary
1919 College Parkway
P.O. Box 8083
Carson City, NV 89702

from: Caesars Entertainment Corporation

subject: **Response of Caesars Entertainment Corporation to Request for Comments on Regulations Concerning Interstate Agreements for Interactive Gaming**

Section 6 of Assembly Bill 114 from the 2013 Legislative Session directs the adoption of regulations authorizing the Governor to enter into agreements with other states with respect to interactive gaming. That direction stemmed, in part, from concerns over the comparatively small population in Nevada and the need for sufficient liquidity for internet poker. (Casino "banked" games do not present the same concern.) Currently Nevada law only authorizes interactive poker. Caesars Entertainment Corporation ("CEC") is pleased to submit this response to the Commission's request for comments.

The Commission has set out five questions on which it has requested comment. CEC addresses each in turn.

1. What topics should the Board and Commission consider putting in regulation relating to an interstate agreement on interactive gaming?

We see three principal issues that these regulations should address. We address one – revenue-sharing – in our response to questions 2 and 3, below. We confine our response here to the issues of suitability and shared regulatory oversight, more generally.

A. Suitability/Gaming Licensing

Ensuring adequate provisions for determining eligibility of operators and service providers to participate in any compacted arrangement is critical. A compacting system that allows the licensees in one state to gain access to the compacted liquidity pool would enable a circumvention of the more stringent standards for suitability and encourage a "lowest common denominator" approach to gaming licensing. Prospective licensees would be able to forum-shop for the least rigorous compacting jurisdiction and apply there, without need to satisfy Nevada's more exacting standards, absent rules to combat this potential problem. This concern is exacerbated in the context of what we anticipate will be "multi-state" compacts, in which more than two states enter into an agreement to pool liquidity among all of their residents.

We can envision at least three potential ways to address this concern.

1. *First*, Nevada might insist on inclusion of a provision in any compact that prohibits the participation of a licensee (operator or service provider) who **presumptively would not satisfy the suitability criteria of the other signatory**. An exception would need to be made, of course, for licensees whose only disqualifying characteristic is that it (or its affiliates) do not have a casino license in the other signatory state. Many state laws – including Nevada's – require that an interactive gaming licensee already have a traditional casino license.

2. Another alternative would be to require a **streamlined determination of suitability** by each compacting state before a licensee from the other state would be allowed to participate. Any signatory state would be free to waive that requirement if it wished.

3. Another effective and likely simpler way to address the same concern would be to **require that any compact arrangement (bilateral or multi-state) only allow a gaming operator licensee to share liquidity with itself (or with its affiliates)**. So for example, Caesars Interactive Entertainment, Inc. (CIE), a licensed operator in Nevada, could share poker liquidity with CIE's customers in New Jersey (assuming CIE or a CIE affiliate obtains a license to operate online gaming in New Jersey). This situation eliminates the "lowest common denominator" problem noted above. Also, this solution eliminates the practical problem that sharing liquidity with an operator that operates on a different poker platform is not possible (or at least extremely difficult). Of course, even in this circumstance, some sort of scrutiny of service providers – along the lines of either of the two approaches described above – still would be required.

Even under these scenarios, circumvention of rigorous suitability would be possible in a multi-state compact; an operator simply might exclude Nevada players from its site in order to avoid complying with the Nevada requirement. As a result, we strongly recommend that Nevada insist, as part of any multi-state compact, that **"sub-compacts" (allowing exclusion of one or more participating states) are prohibited without all compacting states' consent**.

B. Shared Regulatory Oversight

We believe it unlikely that all states would agree to forego all regulatory authority in favor of Nevada, notwithstanding its reputation as a leader in gaming regulation. We do think some states might wish to "outsource" substantial aspects of oversight to Nevada – something Nevada should encourage. (Strategies for doing so are discussed below in response to questions 2 and 3.) In general, we think aspiring to a role as "primary" regulator – regulator of first resort, with the state of player origin retaining an ability to step in if desired – may be the most realistic, assertive position for Nevada to adopt in any compact negotiation.

If, as seems possible, some states wish to share regulatory oversight as part of a compacting arrangement with each responsible for its own licensees, it will be necessary to develop a common understanding of each state's expectations regarding technical standards, consumer protections and the like.

As with suitability, one option would be to create a streamlined process for licensure of other signatories licensees prior to allowing those licensees to participate in a compacted arrangement. However, ideally, that could be avoided if common standards and requirements can be agreed, though we understand the difficulties in finding a common understanding on these issues.

One related question that the Commission and Board must be prepared to confront may be the need to discriminate among states, recognizing some states' regulatory bodies as "more reliable" or entitled to more deference than those of others. A **uniform body of requirements and standards for oversight** would help alleviate the tension this otherwise might create, making that even more desirable if it can be achieved.

Lastly, we think it important that any compact contain provisions allowing for mutual consultation in the event of concerns. The concept of interstate compacting in the gaming arena is novel and its implementation undoubtedly will prove complex. Inevitably, unforeseen issues will arise, and the compacts should delineate precisely how those issues may be discussed and resolved.

2. Should revenue sharing between signatory states to a compact be based on the location of where the wager originated? Why or why not? Please be specific and cite any relevant legal support.

We understand "location of where the wager originated" to mean location of the player placing the wager.

Revenue-sharing may prove the biggest obstacle to compacting for Nevada as it raises the question: why would another state want to compact with Nevada? Nevada's comparatively limited population is the largest concern, of course.

We do think Nevada should attempt to position itself as willing to shoulder principal regulatory responsibilities for other states as part of a compact. Nonetheless, larger states are unlikely to find offloading regulatory responsibilities a sufficient enticement if it comes at any substantial cost. As a result, to encourage compacting Nevada may need to be content with a very small proportion of the revenue associated with other states' players – perhaps only assessing a licensing and renewal fee on all licensed operators within a compact in return for handling primary regulatory oversight, but receiving no portion (or a very small portion) of any fee associated with non-Nevada players. Even this type of arrangement would provide a benefit to Nevada, in the form of additional licensing fees through licensing of other states' operators and access for its own licensees to other states' markets, as well as a more robust online poker market for persons located in Nevada (due to enhanced liquidity), which will increase the revenue for Nevada.

It may be worth considering two different models – one for larger states, as just noted, and a second for smaller states, which may not have regulatory expertise and, because they also lack liquidity, may be open to a more equitable distribution of tax revenue.

3. Should revenue sharing between signatory states to a compact be based on the location of the licensed interactive host? Why or why not? Please be specific and cite any relevant legal support.

See response to question 2, above. Although equitably it seems fair to apportion some revenue based on location of the licensed host, we expect larger states will insist on allocation of the lion's share of the revenue based on location of the player. Even so, we believe Nevada would benefit from appropriately negotiated compacts through greater liquidity for players in Nevada and licensing and related fees it may require as part of a role in primary regulatory oversight.

4. Should the regulatory body of the signatory state where the wager originated have control over player disputes related to said players? Why or why not? Please be specific and cite any relevant legal support.

We are unaware of any directly relevant legal support on this question, beyond the general proposition that states' gambling regulations are designed, among other things, to protect patrons within those states. In the internet context, it seems reasonable to expect that a state may assert an interest in ensuring that its residents are treated fairly even if interacting with a licensed host from another state.

This need not require direct control over player disputes, of course. Indeed, in other, non-gaming, internet commerce contexts, courts have upheld consumer agreements that specify governing laws and venues for disputes where the online merchant is located, regardless of the location of the consumer. *See, e.g., Brodsky v. Match.com LLC*, 09 CIV. 5328 (NRB), 2009 WL 3490277 (S.D.N.Y. Oct. 28, 2009) (noting that it is perfectly reasonable and legitimate for a company operating a website and service accessible to users anywhere in the country to decide that any disputes about its website or services should be located in a particular state); *Simonoff v. Expedia, Inc*., 643 F.3d 1202, 1205 (9th Cir. 2011) (upholding forum selection clause in website's terms and conditions). *But see* Directive 97/7/EC of the

European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (requiring members to enact provisions specifying that in remote transactions, law of consumer's home country governs).

There are limitations to that proposition, however. Notwithstanding a contractual choice of law, a forum selection clause will not be enforced: "(1) if incorporation [of the clause] into the agreement was the result of fraud or overreaching; (2) if the complaining party will for all practical purposes be deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state." *Roby v. Corporation of Lloyds*, 996 F.2d 1353, 1363 (2d Cir.1993) (citing *M/S Bremen v. Zapata Off–Shore Co*., 407 U.S. 1, 15 (1972)).

Nonetheless, in the lone instance of which we are aware where this issue has arisen in the internet gaming context, the Sixth Circuit Court of Appeals upheld a gaming operator's forum selection provision requiring adjudication of disputes in that operator's home jurisdiction. *Wong. v. PartyGaming Ltd.*, 589 F.3d 821 (6th Cir. 2009) (upholding dismissal of suit brought by former Ohio players based on a Gibraltar forum selection provision in user agreement).

Against that legal backdrop, we think it fair and consistent with generally applicable consumer protection laws to require that player disputes be resolved under the auspices of the regulatory authority with oversight of the licensed host, even if the player is located elsewhere. Any interstate compact should specify **minimum standards for player protection and dispute resolution**, allowing compacting states to obtain sufficient comfort that acceptable protections are in place.

If that approach encounters resistance, one alternative may be to adopt a "primary/secondary" model, in which the authority in the state of the licensed host has primary jurisdiction over player disputes and, only if the player's state authority is concerned with the disposition of a dispute in a particular case, would it then intervene and work cooperatively with the first state authority toward resolution. Ultimately, however, one body must have final decision-making responsibility, and that should be the regulator with authority over the licensed host. A state dissatisfied with the way another state is handling these issues can raise those concerns through the compact's consultative processes (or, if sufficiently exercised, withdraw from the compact).

As a practical matter, it will be in the interest of the licensed host or of the licensing state regulator to deal with player disputes fairly and transparently as to do otherwise would risk withdrawal from or renegotiation of the compact.

5. Please provide any other information not requested above that is relevant to regulations for interstate agreements on interactive gaming.

We address two additional issues that we think are relevant to the issue of interstate compacting generally, if not to the immediate regulatory process.

A. Ability under federal law to enter into interstate compacts

A necessary prerequisite to interstate compacting is determining whether state law provides an adequate legal basis under federal law for Nevada to enter into the compacts. Absent a change in the federal government's position on the Wire Act or new legislation by Congress, no federal law prohibits a voluntary compact between or among states, so long as the contemplated activity in each such state is lawful.

Although Congress possesses plenary power under the Commerce Clause, Art. I, § 10, cl. 3, to withhold consent from any interstate compact, as a practical matter, history has shown that Congress rarely

intervenes to prevent interstate compacting, and we think the chance of such intervention here – absent agreements that Congress deems wildly irresponsible, that violate individual signatories' laws, or that intrude upon federal prerogatives – is quite small.

Because unlicensed gambling is not lawful in any state unless expressly permitted, and because the gambling must be lawful in both compacting states in order to satisfy the Unlawful Internet Gambling Enforcement Act (and likely other federal laws), each state almost certainly would need affirmatively to authorize the gaming activity. Allowing interstate wagering without approval of the other state would raise severe risk that the activity would be found in violation of the other state's and federal laws, and risk congressional intervention.

We do not think it necessary or advisable for Nevada to conduct its own examination of whether a proposed compacting partner's laws permit this activity. Instead, it should rely on the duly appointed state governmental authority's representations in that regard.

B. Limitation on games.

One additional hurdle to interstate compacts may be the Nevada poker limitation. As noted, one of Nevada's goals is to become the "regulator of choice" in an interstate compact, with other states potentially "outsourcing" primary regulatory oversight to Nevada in exchange for a sharing of revenue. However, it is not clear to us how Nevada could serve as regulatory body of choice for other games that may be authorized by compacting states. For example, Delaware recently passed online gaming legislation that encompasses a wide variety of games, in addition to poker. If Nevada can't do it all, why should another state have Nevada do anything? Of course, the expansion of interactive gaming beyond poker would raise broader policy issues, but one factor to consider would be the degree to which such expansion may facilitate favorable compacting arrangements with other states.