



NATIONAL INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

REGULATORY ALERT

TO: NIGA Member Tribes

FR: Ernest L. Stevens, Jr., Chairman
Mark Van Norman, Executive Director
Jason Giles, Deputy Executive Director

RE: NIGC Publishes Class II Definitions and Classification Standards in the Federal Register

DA: June 28, 2006

On May 25, 2006, the National Indian Gaming Commission (NIGC) published their proposed rules for Class II Definitions and Classification Standards in the Federal Register. The NIGC has undertaken this rulemaking step to impose greater restrictions on class II gaming than currently exists under the Indian Gaming Regulatory Act (IGRA) or the NIGC's present regulations. The rules effectively rewrite the legal standards for establishing that a game and its equipment fall within the definition of class II gaming. NIGA, Tribal leaders, regulators, and others involved in Indian gaming are concerned that this current rulemaking has the potential of jeopardizing the viability of tribal governmental enterprises vital to Indian country and tribal self-sufficiency.

Since January 2005, the NIGC has undertaken a rulemaking that appears determined to impose greater restrictions on class II gaming than exist under current law or the NIGC's present regulations. Tribes have consistently voiced concerns that the proposed rules would undermine the status of tribal governments as the primary regulators of Indian gaming and turn back the clock on the class II industry, particularly with regard to the use of electronic, video and computer equipment. With the publication of these regulations, the NIGC has caused substantial unease throughout the class II industry and in particular for those tribes located in states unwilling to negotiate compacts for class III gaming.

Lack of Meaningful Tribal Consultation

As an initial matter, tribal leaders have consistently expressed concern that the current rulemaking lacked *meaningful* consultation throughout the drafting process. Notwithstanding the fact that the NIGC assembled a tribal advisory committee to participate in the process, the committee *was not* invited to participate in drafting the proposed regulation. Equally troubling,

Tribal comments submitted to the NIGC during the drafting process were never made public by the NIGC and it is unclear if any of the comments were considered during the drafting process.

The NIGC must comply with its own consultation policy and engage in real government to government negotiations with tribes. The NIGC has announced it is scheduling individual meetings with Tribes to discuss the proposed rules. The meeting dates are as follows:

- July 10–11 Minneapolis, Minnesota.
- July 12–13 Denver, Colorado.
- July 18–19 Washington, DC.
- July 24–25 Tacoma, Washington.
- July 26–27 Ontario, California.
- August 8–9 Oklahoma City, Oklahoma.

NIGA is going to request additional meetings in Montana and Florida as well as public hearings on the regulations.

Summary of Proposed Rules

The NIGC is proposing to amend its class II definition regulations as follows:

1. Revise § 502.8 to read as follows:

§502.8 Electronic or electromechanical facsimile.

- (a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.¹
- (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
 - (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
 - (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.²
- (c) Bingo, lotto, other games similar to bingo, pull tabs, and instant bingo games that comply with Part 546 of this chapter are not electronic or electromechanical facsimiles of any game of chance.³

¹ 71 Fed. Reg. 30232, 30235 (May 25, 2006).

² 71 Fed. Reg. 30232, 30235 (May 25, 2006).

³ 71 Fed. Reg. 30238, 30255 (May 25, 2006).

2. Revise § 502.9 to read as follows:

§ 502.9 Other games similar to bingo.

Other games similar to bingo means any game played in the same location as bingo (as defined in 25 U.S.C. 2703(7)(A)(i)) that constitutes a variant on the game of bingo, provided that such game requires players to compete against each other for a common prize or prizes.⁴

3. Proposed Classification Standards For Bingo, Lotto, Other Games Similar To Bingo, Pull Tabs, and Instant Bingo

This part clarifies the terms Congress used to define class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, *et seq.* (IGRA or “Act”). Specifically, this part explains the criteria for determining whether a game of bingo or lotto, and “other games similar to bingo,” or a game of pull-tabs or “instant bingo,” meets the statutory requirements when these games are played primarily through an “electronic, computer or other technologic aid.” This part also establishes a process for establishing Class II certification of “electronic, computer, or other technologic aids” and the games they facilitate. The NIGC states that these standards for classification are intended to ensure that Class II gaming using “electronic, computer, or other technologic aids” can be distinguished from forms of Class III gaming that employ “electronic or electromechanical facsimiles” of a game of chance or slot machines

Display Requirements For Bingo, Lotto, or Other Games Similar to Bingo

The NIGC regulation will require that electronic cards be prominently displayed and clearly visible at all times during game play. If multiple cards are used, the player must be capable of seeing each card during game play, and at the end of the game, must be shown the card with the highest winning prize or the card closest to a bingo win. New card requirements would mandate that no card can measure less than 2 inches by 2 inches, or 4 inches square if other than a square card is used. For bingo games, each card must contain a 5 by 5 grid of spaces. Finally, for games similar to bingo, each card must contain at least 3 equally sized spaces. One space may be designated as a free space, provided that the card has at least 3 other spaces.

Notice and Prize Requirements

The NIGC regulation will require that games of bingo, or other games similar to bingo, shall fill at least ½ of the total space available for display. Each technologic aid shall prominently display the following message: “THIS IS A GAME OF BINGO” or “THIS IS A GAME SIMILAR TO BINGO.” Each letter of the display must measure at least two (2) inches in height. The designated winning patterns and prizes available must be explained in the Rules of the Game, which must be available to the players upon request. Each game must have a winner and a game-winning prize. The game-winning pattern does not have to pay the highest prize available in the game. A game-winning prize may be less than the amount wagered, provided

⁴ 71 Fed. Reg. 30238, 30255 (May 25, 2006).

that the prize is no less than 20% of the amount wagered by the player on each card and at least one cent.⁵

Alternate game display. In addition to displaying the outcome of the game on the bingo card, the outcome of the game may be displayed in an alternate manner. The alternate display may include video graphics or mechanical reels. The player must have the option of turning off the entertaining display and playing the game only on the bingo card display. The alternate display cannot fill more than ½ of the total display space.

Game Requirements For Bingo, Lotto, Other Games Similar To Bingo, Pull Tabs, and Instant Bingo

Ball Draw. The ball draw must consist of 75 numbers or other designations, used in the same sequence as drawn. A common ball draw may be utilized for separate games that are played simultaneously. For games similar to bingo the ball draw must consist of a number that is greater than the number of spaces on the card used in the game. §546.5(b).⁶ The ball draw must be used in real time and in the same sequence in which the numbers are drawn. A *minimum* of 2 seconds must be provided after the completion of each release for players to daub. The game may not proceed until at least one player has daubed, but, in any event may not proceed in less than two (2) seconds.

Daubing requirements. An overt action is required after each release to daub. Games may not include a feature whereby daubing occurs automatically. Numbers on a player's card do not have to be daubed individually; however, players must have an opportunity to daub after each release, if those numbers appear on the player's card. Players must be notified of their opportunity to daub and once daubed, the spaces must be visibly marked. The NIGC rules will require that all players, and not just a winning player, be required by the rules of the game to daub numbers on their card as an indication of their participation in a common game.

Sleeping requirements. Players must cover after each release in order to win a prize, except that (subject to the following) a player may "catch-up" slept numbers or designations that comprise the game-winning pattern. Slept numbers comprising any other pattern are forfeited. For game-winning prizes, a player can "catch-up" slept number(s) and win, but only if that player is the first player to cover all other numbers or designations making up the game-winning pattern. For bonus prizes (interim and consolation) and progressive prizes, all slept numbers are forfeited.

If a player sleeps the game-winning pattern, the game must continue until someone obtains, daubs, and claims the game-winning pattern. In the event all available numbers are

⁵ "Other patterns may be designated for the award of bonus prizes in addition to the prize to be awarded based on the game-winning pattern. Each such designated pattern or arrangement must also be disclosed to the players upon request before the game begins." Proposed Rule at §546.4(h).

⁶ "As a variant of bingo, in an "other game similar to bingo," the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool of such numbers or other designations which is greater than the number of spaces on the card used in the game." Proposed Rule at §546.5(b).

drawn and released and no player has daubed the game-winning prize, the game may allow an unlimited length of time to complete the last required daub and claim the prize, or it may be declared void and wagers returned to players and prizes canceled.

Identification of slept numbers and patterns. All slept numbers must be identified by either displaying them in a unique color, by drawing a strikeout through them, or by other readily visible means. A player who sleeps any winning pattern must be visibly notified that the pattern was slept. §546.5(l).⁷

4. Proposed Classifications For Pull-Tabs and Instant Bingo

Game must not be an electronic or electromechanical facsimile

Each pull-tab or instant bingo ticket must exist in a tangible medium such as paper. Hereafter the term “pull tab” also includes “instant bingo.” A pre-printed pull-tab must be distributed to the player as paper, plastic or other tangible medium at the time the pull-tab is purchased. The pull-tab presented to the player must contain the information necessary for the player to determine if that player has won a prize in the game. The information must be presented to the player in a readable format. §546.7(a).⁸

If the pull-tab is a winner, it must be redeemable for a prize when presented at the designated redemption site in the gaming facility. The machine cannot pay out winnings to the player, nor dispense vouchers or receipts representing such winnings. A pull-tab may not be generated or printed at the player station. The winning results on the pull-tab shall be no smaller than an 8 point font.

Numbers or symbols. The player must pay for all of the arrangements on a pull-tab before it is dispensed. A pull-tab may contain more than one arrangement of numbers or symbols, but each arrangement must comport with the requirements of this section. If pull-tabs contain multiple arrangements of numbers or symbols, the rules for game play must address disposition of a pull-tab that is only partially played.

Use of technologic aids. Pull-tabs that exist in a tangible medium may also be sold to players with a technologic aid. The technologic aid may also read and display the contents of the pull-tab as the pull-tab is distributed to the player. The results of the pull-tab may be shown on a video screen that is part of or adjacent to the technologic aid. The player may also purchase a pull-tab from a person or from a vending unit and place the pull-tab in a separate

⁷ “All numbers or other designations slept by a player must be clearly and uniquely identified as such by displaying them in a unique color, by drawing a strikeout through them, or by other readily visible means. A player who sleeps a winning pattern must be notified by visible message on the video screen that the pattern was slept. Players who fail to cover (daub) numbers or other designations that establish patterns yielding bonus or progressive prizes also must be notified by visible message on the video screen that the pattern was slept.” Proposed Rule at §546.5(l).

⁸ “Every pull-tab card or instant bingo ticket must exist in a tangible medium such as paper. Hereafter, the term “pull tabs” also includes the term “instant bingo.” A pre-printed pull-tab must be distributed to the player as paper, plastic, or other tangible medium at the time the pull-tab is purchased. The pull-tab presented to the player must contain the information necessary for the player to determine if that player has won a prize in the game. The information must be presented to the player in a readable format.” Proposed Rule at §546.7(a).

technologic aid that reads and displays the contents of the pull-tab. The game results may be shown on a video screen that is part of the technologic aid using alternative displays, including graphics, spinning reels, mechanical reels, or other imagery. The alternate display cannot determine the winner or change the outcome of the game. For technologic aids that are larger than the pull-tab, the machine shall prominently display the following message: "THIS IS THE GAME OF PULLTABS." Each letter of the display must measure at least two (2) inches in height.

When is a pull tab or instant bingo game an "electronic or electromechanical facsimile?"

The NIGC would label a pull tab game an "electronic facsimile" if the pull tab does not exist in paper, plastic, or other tangible medium at the point of sale and is displayed only electronically. Pull-tabs that exist in a tangible medium but that are electronically or optically read and transformed into an electronic medium and made available to the player only as depictions on a video screen (and not presented directly to the player in the tangible medium) are "electronic facsimiles."

5. Approval, Introduction, and Verification Process

Certification Requirements

A party seeking to have games certified as class II must submit the games and equipment to a testing laboratory recognized by the Commission. The requesting party must support the submission with sufficient materials and software, and must provide additional information as requested. The tribe must require that the testing laboratory evaluate and test the submission to these standards. Any issues identified during this process will first be discussed between the testing lab and the requesting party. In the event of impasse, the requesting party and testing lab may jointly submit questions to the Chairman for resolution. Questions regarding any additional tribal standards will be addressed to the appropriate tribal gaming regulatory authority. §546.9(b).⁹

List of certified games. The Commission will maintain a list of games certified as meeting these classification standards, and shall make such list available on its website. Each testing laboratory will maintain a list of games it certifies. Reports provided to the Commission will be available for review, except that confidential and proprietary information will not be made available for public review. §546.9(c).¹⁰

⁹ "For an "electronic, computer, or other technologic aid" to be accepted as certified as meeting the classification standards under this part, the tribe shall require the following." Proposed Rule at §546.9(b). "The testing laboratory will evaluate and test the submission to the standards established by this part. Issues that concern an interpretation of the standards or the certification procedure identified during the evaluation or testing process, if any, will initially be discussed between the testing laboratory and the requesting party. In the event of impasse, the requesting party and the testing laboratory may jointly submit questions concerning the issue to the Chairman, who may decide the issue. Questions regarding additional tribal standards will be addressed to the appropriate tribal gaming regulatory authority." Proposed Rule at §546.9(b)(1).

¹⁰ "The Commission will maintain a generalized listing of games and "electronic, computer, or other technologic aids" certified by recognized testing laboratories as meeting the classification standards established by this part. Each testing laboratory will maintain a detailed listing of the "electronic, computer or other technologic aids" it

Commission Objections

The Chairman or his designee may object to any certification within 60 days. If no objection is raised within 60 days, the testing laboratory, requesting party and sponsoring tribe may assume the Commission does not object; however, nothing precludes the Commission from objecting after 60 days upon a showing of good cause. §546.9(e)(1).¹¹

Within 30 days of notification, the Chairman or his designee will discuss objections with the testing laboratory, requesting party and sponsoring tribe in order to resolve the dispute. If after further review, the Commission continues to object, the testing laboratory and requesting party must notify all parties to whom results were provided that the Commission objects and the certification is no longer valid. A mediator or other third party may be utilized to review the laboratory's certification and the Chairman's objection and provide a recommendation on the matter within this 30-day period. Thereafter, the Chairman will decide the issue based upon the information received and inform the testing laboratory, the requesting party, and the sponsoring tribe of his determination. The Chairman's decision may be appealed to the full Commission within 30 days of receiving notice of the decision.

Recognition of Testing Laboratories

The Commission will maintain a listing of testing laboratories qualified to test class II games. To obtain such recognition, a testing laboratory must:

- a. Demonstrate its integrity, independence and financial stability by providing evidence of a license obtained from a competent jurisdiction that has conducted a thorough background check of the testing laboratory.
- b. Demonstrate its relevant technical skill and capability by providing evidence of testing provided for other state or tribal authorities. The Commission will conduct an onsite review of the testing laboratory's facilities as part of its evaluation and will be satisfied that the testing laboratory is qualified and competent to perform the testing required by this part before recognizing the testing laboratory.
- c. A recognized testing laboratory will notify the Commission immediately if any license issued by a state or tribe is revoked or not renewed.

certifies. The Commission will make its listing available on its Web site. Portions of reports containing trade secrets and commercial or financial information relating to the "electronic, computer, or other technologic aid" that are considered privileged or confidential will not be made available for public review." Proposed Rule at §546.9(c).

¹¹ "The Chairman or a designee will review the certifications and accompanying reports received from testing laboratories and may interpose an objection to any certification issued by a testing laboratory by notification to the testing laboratory, the requesting party, and the sponsoring tribe within 60 days of receipt of the certification and report. In the absence of objection within 60 days, the parties may assume the Chairman does not interpose an objection. The Chairman may object to a testing laboratory certification subsequent to the 60-day period upon good cause shown." Proposed Rule at §546.9(e)(1).

6. Compliance Requirements

Required Tribal Compliance Program

Tribal regulation of class II gaming must include a compliance program that ensures class II games are properly certified. The program must include the following elements:

- a. Determination that the “technologic aid,” along with the games played thereon, satisfies these standards before the equipment is used in the gaming operation;
- b. Internal controls that prevent unauthorized access to game control software to preclude modifications that would cause the “technologic aid” to no longer meet these standards. Emergency changes to a game are permitted prior to certification so long as the change does not affect the classification of the game;
- c. Periodic testing of all of the servers and a random sample of the electronic player stations to validate that the equipment continues to meet the standards established by this part.

Certification.

In authorizing class II games, a tribal gaming regulatory authority shall, at a minimum, require certification by a recognized testing laboratory that each “technologic aid” used in connection with such game meets these standards. If the tribe has established additional standards, the tribe shall require additional findings consistent with these additional standards as a condition of authorizing use of a technologic aid.

The tribe shall affix a seal or other label on each server and each player terminal it has authorized for play under these classification standards, indicating that all games played thereon meet these standards and any additional standards established by the Tribe.

By law, the NIGC must accept written comments on the proposed rules until August 23, 2006. Enclosed for your Tribe’s use is a draft comment letter addressed to the NIGC. Please send a blind carbon copy to NIGA and please contact Jason Giles at 202-546-7711 if you have questions or comments. NIGA will continue to monitor this issue, and update you as it progresses.

Comments Due On August 23, 2006!

[Date]

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: Comments on Class II Classification Standards and Electromechanical Facsimile Definitions

Dear Chairman Hogen and Vice Chairman Choney:

I write on behalf the _____ Tribe to comment on the NIGC's proposed rules for Class II Classification Standards and Definitions. Our Tribe remains concerned with the manner in which the NIGC has developed these regulations. The current rulemaking process lacked meaningful consultation with Indian Tribes. Notwithstanding the fact that the NIGC assembled a tribal advisory committee (TAC) to participate in the process, the committee *was not* invited to participate in drafting the proposed regulations and little if any of the TAC's input has been incorporated into the NIGC's proposed rules. Equally troubling, Tribal comments submitted to the NIGC during the drafting process were never made public by the NIGC and it is unclear if any of the comments were considered during the drafting process.

The NIGC must comply with its own consultation policy and engage in meaningful government to government negotiations with tribes. The NIGC should also hold public hearings on the regulations with comments and submissions recorded as part of the administrative record.

We ask that the agency refrain from placing arbitrary restraints on class II gaming. Although we have no strong objection to removing the term "house banked" from the definition of a "game similar to bingo," we oppose the proposed definition of "electromechanical facsimile." We disagree with the NIGC's claim that bingo, lotto, and other games similar to bingo, are facsimiles when played in an electronic medium. The current definition is clear on its face, so long as the electronic format broadens participation among players and is not played against the machine, such games are *not* facsimiles. Please delete the proposed re-definition. (See Proposed Rule at §502.8).

The classification standards are arbitrary and contrary to established case law. Please delete the proposed restrictions on the game display, ball draw, daubing, prize amounts, and player interaction. These new requirements, rather than clarifying the existing regulations, appear to repudiate most variants of bingo, slows the play of those that remain, and prevents any meaningful electronic play of pull tabs.

For example, without any statutory or case law authority the regulations impose additional restrictions on pull tabs. Under the proposal, the player terminal may neither accumulate credits nor award cash. A player must, therefore, redeem any pull-tab winnings through a clerk or

kiosk, and cannot merely transfer credit between machines. This restriction greatly hinders player flexibility and the use of current cashless technology.

We also object to the redefinition of the statutory term "game of bingo." In enacting IGRA, Congress placed only three requirements on a game of bingo. Notably, the federal courts have continuously held that these three requirements "constitute the sole *legal* requirements for a game to count as class II bingo." The NIGC's current imposition of additional requirements prohibits the growth of class II gaming and micromanages tribal business judgment and regulatory responsibilities. The proposed regulations would eliminate virtually all games that Congress intended to allow as "similar to bingo." The following proposed provisions place arbitrary restrictions on bingo and games similar to bingo and must be deleted:

- 1) the required use of five by five grid cards (25 spaces) (§546.4(c));
- 2) games can only use ball draws numbered from 1 through 75 (§546.5(a));
- 3) elimination of "pre-drawn" balls (if allowed to become law, this would prohibit the electronic play of "Bonanza Bingo," even as a game similar to bingo);
- 4) mandatory time periods (2 seconds) to play of the bingo game (a requirement wholly unsupported under current law) (§546.5(i));
- 5) the requirement for multiple ball releases; the releases may not be instantaneous, and each release must take two seconds (§546.6(c));
- 6) the elimination of auto-daub and requirement for two seconds of daub time before the next release is permitted (§546.5(i)).

We are also concerned that the regulations fail to resolve the basic problems associated with the NIGC's game classification process and omit a meaningful role for tribal regulators. Under the proposed regulations, independent gaming laboratories, as licensed by the Commission, would certify games as complying with the regulations. Without "grandfathering," few, if any, existing games would comply the proposed regulations, even those already approved by courts or by the NIGC itself. In the interests of fairness, the NIGC should permanently "grandfather" all of the games it has approved as well as the games that the Federal Courts have approved.

Finally, under the proposed rules, only the NIGC Chairman may object to a classification decision. Tribes have no such option, except in defense of an enforcement action. Laboratories must be approved annually, and may lose that approval if the NIGC is dissatisfied with their certification decisions. As the primary regulators of class II gaming, Tribes should be afforded the opportunity to challenge such an opinion on a government-to-government basis, without having to first subject itself to enforcement action.

In sum, the regulations arbitrarily redefine established regulatory terms and limit what Congress clearly intended to permit. Under IGRA, Congress clearly permits the use of electronic equipment, or “technologic aids,” in the play of class II games. Legislative history shows that Congress was alert to the fact that technology would continue to advance, and that class II gaming likewise should be allowed to evolve and grow through technological advancement. As noted in the Senate report: “The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.”

The NIGC should honor both the spirit and the language of IGRA, the Tribes’ hard-fought federal court victories, and the NIGC’s own regulatory framework: most prominently, the current 2002 definition regulations. We urge the NIGC to give these comments serious consideration and to refrain from placing unwarranted restrictions on class II gaming.

Sincerely,

Bcc: NIGA
224 Second Street, SE
Washington, DC 20003
Fax: (202) 546-1755