



## OFFICE OF THE GOVERNOR

November 9, 2006

Ms. Penny Coleman  
Acting General Counsel  
National Indian Gaming Commission  
1441 L Street, NW., Suite 9100  
Washington, D.C. 20005

Re: Comments on Electronic or Electromechanical Facsimile  
Definition & Class II Classification Standards

Dear Ms. Coleman:

Thank you for the opportunity to comment on the National Indian Gaming Commission's ("NIGC") proposed regulations regarding bingo, lotto, other games similar to bingo, pull tabs and instant bingo when those games are played through an electronic medium using electronic, computer, or other technologic aids.

### 1. Introduction

With more than 50 class III casinos and 66 tribes with compacts authorizing the operation of class III gaming, California has a vital interest in the subject matter of these proposed regulations. The ambiguity in the law and the absence of definitive regulation has led to judicial interpretations that, in conjunction with advances in technology, have made it difficult to distinguish between class II and class III gaming.<sup>1</sup> As a result, devices that look and play like class III machines, but which are designed to conform to judicial definitions of a class II "technologic aid," have become increasingly prevalent as an economically attractive alternative for manufacturers and tribal gaming operations.

<sup>1</sup> While under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA") a "slot machine" of any kind is not a class II gaming device (25 U.S.C. § 2703(7)(B)(ii)), judicial decisions have determined that a machine that has the characteristics of a "slot machine" may nonetheless be permissible if it qualifies as a class II "technologic aid."

Furthermore, because federally recognized tribes may conduct class II gaming on their Indian lands without a tribal-state gaming compact, the ready availability of "technologic aid" gaming devices affects the State's ability to mitigate the off-reservation impacts of tribal gaming and to negotiate equitable compact terms with interested tribes.

We are encouraged by the statements made in the preamble to the proposed regulations that it is necessary to draw a bright line distinction between class II games and class III facsimiles that require compacts between tribes and states. IGRA established the compacting process, in part, to provide tribes with the resources to become financially independent, while also protecting the states from the impacts of Indian gaming. These twin aims are undermined by the present legal landscape, which creates little practical distinction between the two gaming types. To be faithful to the goals and objectives of IGRA, the regulations implementing that act must ensure that class II devices are not functionally interchangeable with class III devices.

As also noted in the preamble to the proposed regulations, one of the key differences between slot machines, bingo and games similar to bingo is the amount of player participation involved. With a slot machine, a player plays against the machine by simply inserting consideration and pressing a button to see a pre-selected outcome. In bingo or similar games, the object is to see if the player, through a comparison of the numbers or symbols provided in real time with a card, can obtain the winning pattern on that card by placing numbers on it before others playing the same game.

Slot machines are lucrative because of the speed and utter simplicity of the games played. Only one player is required, and the player need only insert consideration into the machine and press a button or lever to win. They offer instant results and high player turnover, and do not require any special knowledge or visual or manual dexterity on the part of the player. By contrast, bingo devices require players to compete against one another. They are inherently slower because players are required to concentrate and actively participate in the game using manual and visual dexterity to match drawn numbers and symbols with cards.

The Governor's Office appreciates and supports the efforts that have been taken to impose a bright line distinction between class II and class III gaming. We are concerned, however, that some of the proposed rules may undermine these efforts and, in that regard, offer the following comments.

**2. Comments to the Proposed Rule on the Definition for Electronic or Electromechanical Facsimile**

As you are aware, IGRA defines class III gaming as all forms of gaming that are not considered class I or class II gaming. (25 U.S.C. § 2703(8).) Specifically excluded from the definition of class II gaming are "electronic or electromechanical facsimiles of any game of

chance or slot machines of any kind." (Id.) The proposed rules define "electronic or electromechanical facsimile" as:

"a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game."

The proposed rules also identify bingo, lotto, and other games similar to bingo as facsimiles when:

"(1) The electronic or electromechanical format replicates a game of chance by incorporating *all* of the fundamental characteristics of the game..." (emphasis added.)

In each instance noted above, an electronic or electromechanical facsimile incorporates the "fundamental characteristics" of a game of chance. The only distinction between the two definitions is the inclusion of the word "all" in reference to bingo, lotto, and other games similar to bingo. We are concerned that the appearance of the word "all" in one subparagraph but not in the other will cause confusion and speculation over the scope of each definition. It may be argued that a game of bingo, lotto, or other games similar to bingo that incorporate some, but not all, of the fundamental characteristics of a game of chance are not electronic or electromechanical facsimiles. We do not believe that this is the intent of the proposed rule, and recommend the removal of the word "all" to ensure consistency between the two definitions.

### **3. Comments to the Proposed Rule on Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids"**

As noted previously, a fundamental difference between a slot machine and a bingo or bingo like game is player participation. The proposed rules explain at length why an auto-daub feature would be impermissible and, in fact, prohibit it. (§ 546.5(g).) As the preamble to the rules notes, if a computer or machine:

"performed all of the cover functions for the player without specific player direction or if it performed those functions following an instruction from the player to cover at some later point ... [after numbers were drawn], ... [t]he device would essentially play the game for the player. The player would merely start the game, watch play unfold, and be paid any amounts won without further action."

Notably, however, the proposed rules (§ 546.5(f)) do not require that a player actually daub a number or symbol on a card on the terminal screen. Instead, the player may simply

instruct the machine to cover the card automatically. One of the key skills in bingo or bingo-like games is recognition of the place on the card where the drawn number is to go. If a machine performs this function for a player, in the words of the preamble, the machine is playing the game not the player. The player is merely a passive observer of the actions of the machine. The rules also allow the game to end after the second or subsequent release of one or more numbers or other designations (§ 546.6(c).) That a player must instruct the machine to perform this automatic function twice instead of once is immaterial. A key skill required to successfully compete in a game of bingo — covering the card — is being performed by the machine and not the player.

In addition, the proposed rules require that the electronic card be prominently displayed, covering at least one half of the terminal screen (§ 546.4(b)). Although the outcome of a game must be determined by the outcome on the card and not an external event (§ 546.6(g)), the proposed rules allow the outcome of the game to be depicted on an alternative display such as a spinning reel or other imagery similar to a slot machine, and not strictly on the bingo card (§ 546.4(o).)

Cumulatively, the auto-daub and the alternative display features create the equivalent of a slot machine experience. To win, a player is not required to utilize any amount of manual or visual dexterity to match drawn numbers and symbols with cards. The player may simply insert consideration, hit an auto-daub type button two times following a prompt, and then observe the result on a spinning reel.

To assure functional separation between class II devices and class III slot machines, we recommend that the regulations require players to daub or touch each number or symbol on the card to cover the number, or use an electronic pen or dauber to mark each number or symbol. This assures that the player, rather than the machine, is playing the game. Second, the result of the game should be depicted on the card, without the option of an alternative display. In our view, this is not a question of entertainment value, but involves the essential characteristics of the game being played.

We are also concerned about the enforcement mechanisms in the proposed regulations. (See generally § 546.9.) As proposed, class II games and associated equipment will require certification from a testing laboratory to ensure compliance with NIGC's classification standards. (§546.10(e).) Moreover, this certification is required prior to a game's use in a gaming operation. (Id.) Under the proposed regulations, however, only the NIGC chairman or a designee is authorized to object to a laboratory's certification of a particular game. (§ 546.9(e).) There is no authority for others to object, or for the NIGC as a whole, to object to an improper certification by a testing laboratory. In light of the critically important function that will be

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assumed by the independent testing laboratories, we believe that a mechanism should be in place to allow any interested party, including states, other manufacturers, and a tribe's competitors to object to a laboratory's determination that a game meets the NIGC's classification standards.

#### 4. Conclusion

We appreciate the opportunity to comment on the proposed regulations. With our recommended changes, we feel the regulations will establish a system for assuring that class II and class III games will remain functionally distinct and that the goals and objectives of IGRA will be fulfilled.

Sincerely,



ANDREA LYNN HOCH  
Legal Affairs Secretary