

DEPARTMENT OF THE INTERIOR**National Indian Gaming Commission****25 CFR Part 502**

RIN 3141-AA31

Definition for Electronic or Electromechanical Facsimile

AGENCY: National Indian Gaming Commission ("NIGC" or "Commission").

ACTION: Proposed rule.

SUMMARY: The proposed rule revises the definition of a term Congress used to define Class II gaming. Specifically, the proposed rule revises the definition for "electronic or electromechanical facsimile" that appears in the Commission's regulations. The Commission defined these terms in 1992 and revised the definitions in 2002. The proposed rule offers further revision.

DATES: Submit comments on or before December 10, 2007.

ADDRESSES: Mail comments to "Comments on Electronic or Electromechanical Facsimile Definition," National Indian Gaming Commission, Suite 9100, 1441 L Street, NW., Washington, DC 20005, Attn: Penny Coleman, Acting General Counsel. Comments may be transmitted by facsimile to 202-632-0045, or mailed or submitted to the above address. Comments may also be submitted electronically to facsimile_definition@nigc.gov.

FOR FURTHER INFORMATION CONTACT: Penny Coleman or John Hay, Office of General Counsel, Telephone 202-632-7003. This is not a toll free call.

SUPPLEMENTARY INFORMATION:**Background**

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701-21, enacted by the Congress in 1988, establishes the NIGC and sets out a comprehensive framework for the regulation of gaming on Indian lands. The Act establishes three classes of Indian gaming.

"Class I gaming" means social games played solely for prizes of minimal value or traditional forms of Indian gaming played in connection with tribal ceremonies or celebrations. 25 U.S.C. 2703(6). Indian tribes regulate Class I gaming exclusively. 25 U.S.C. 2710(a)(1).

"Class II gaming" means the game of chance commonly known as bingo, whether or not electronic, computer, or other technologic aids are used in connection therewith, including, if

played in the same location, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and various card games so long as they are not house banking games. 25 U.S.C. 2703(7)(A). Specifically excluded from Class II gaming, however, are banking card games such as blackjack and electronic or electromechanical facsimiles of any game of chance or slot machines of any kind. 25 U.S.C. 2703(7)(B). Indian tribes and the NIGC share regulatory authority over Class II gaming. 25 U.S.C. 2710(a)(2). Indian tribes can engage in such gaming without any state involvement.

"Class III gaming" includes all forms of gaming that are not Class I gaming or Class II gaming. 25 U.S.C. 2703(8). Class III gaming thus includes all other games of chance, including most forms of casino-type gaming such as slot machines of any kind, electronic or electromechanical facsimiles of any game of chance, roulette, banking card games such as blackjack, and pari-mutuel wagering. Class III gaming may be conducted lawfully only if the state in which the tribe is located and the tribe reach an agreement called a tribal-state compact. Alternatively, a tribe may operate Class III gaming under gaming procedures issued by the Secretary of the Interior if the tribe and the state have not reached agreement or if the state has refused to negotiate in good faith toward an agreement. The tribal-state compact or Secretarial procedures may contain provisions for concurrent state and tribal regulation of Class III gaming. In addition, the United States Department of Justice possesses exclusive criminal jurisdiction over Class III gaming on Indian lands and also possesses certain civil jurisdiction over such gaming.

As a legal matter, Congress defined the parameters for game classification when it enacted IGRA. As a practical matter, however, the congressional definitions were general in nature and specific terms within the broad gaming classifications were not explicitly defined. The Commission adopted regulations in 1992 that included definitions for many terms used in the statutory classification scheme, including "electronic or electromechanical facsimile," 25 CFR 502.7, and "electronic computer or other technologic aid," 25 CFR 502.8. The Commission revised the definitions in 2002. See 67 FR 41166 (Jun. 17, 2002) for an extensive discussion of the reasons for the Commission's decision to revise these key terms.

A recurring question as to the proper scope of Class II gaming involves the use of electronics and other technology

in conjunction with bingo and lotto as well as pull tabs, instant bingo, and other games similar to bingo that may be Class II if played in a location where Class II bingo is played. In IGRA, Congress recognized the right of tribes to use "electronic, computer or other technologic aids" in connection with these forms of Class II gaming. Congress provided, however, that "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" constitute Class III gaming. Because a tribe wishing to conduct Class III gaming may do so only in accordance with an approved tribal-state compact, it is important to distinguish the two classes.

As the Commission worked through a process to develop classification standards, it became apparent that the revised definitions issued by a divided Commission in June 2002, See 67 FR 41166 (Jun. 17, 2002), did not provide the clarity that had been a goal in that rulemaking. Accordingly, the Commission proposes to revise the definition of the term "electronic or electromechanical facsimile."

Purpose and Scope

The definition for "electronic or electromechanical facsimile" has been misconstrued by some as allowing for bingo facsimiles. The Commission is convinced that there needs to be a distinction with a difference between Class II and Class III gaming. Under IGRA, a facsimile is Class III. Courts have taken a plain meaning approach to defining facsimile finding that facsimiles are exact copies or duplicates. *Sycuan Band of Mission Indians v. Roach*, 54 F.3d 535 (9th Cir. 1995); *U.S. v. 162 Megamania Gambling Devices*, 231 F.3d 713, 724 (10th Cir. 2000). It has also been recognized that facsimiles of Class II games would be considered a Class III game under IGRA. *Diamond Game v. Reno*, 230 F.3d 365, 366 (D.C. Cir 2000). It has likewise been affirmed that facsimiles of games of chance including bingo would be violations of IGRA. *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000). Finally, it has been determined that even if a player is playing against another player and not simply the machine that the game may nonetheless be a facsimile. *Sycuan Band*, 54 F.3d at 542-43 (concluding that an electronic pull-tab game in which one player played with a machine, though not against it, was a class III electronic facsimile thereof). The proposed change to the definition for the term "electronic or electromechanical facsimile" will

clarify that facsimiles of bingo are not permissible Class II games under IGRA.

Changes to the Definition of “Electronic or Electromechanical Facsimile” in Part 502

a. “Electronic or electromechanical facsimile”

The Commission proposes to revise the definition for “electronic or electromechanical facsimile” contained in § 502.8. Some have misinterpreted the 2002 revision and argued that facsimiles of bingo were properly classified as Class II. The revision makes clear that all games including bingo, lotto and “other games similar to bingo,” when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game. In making this change, the Commission also wishes to emphasize that even bingo, lotto, and “other games similar to bingo” are “electronic or electromechanical facsimiles” of a game of chance when the format for the game either has players playing against a machine rather than broadening participation among multiple players, or fully incorporates all of the fundamental characteristics of these games electronically and requires no competitive action or decision making.

Regulatory Matters

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of \$100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability

of U.S. based enterprises to compete with foreign-based enterprises.

Takings

In accordance with Executive Order 12630, the Commission has determined that this proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is therefore not subject to review by the Office of Management and Budget.

National Environmental Policy Act

The Commission has determined that this proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

List of Subjects in 25 CFR Part 502

Gambling, Indian—lands, Indian—tribal government, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, the Commission proposes to amend its regulations in 25 CFR part 502 as follows:

PART 502—DEFINITIONS OF THIS CHAPTER

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2071, *et seq.*

2. 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 all the fundamental characteristics of the game.

(b) 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 games of chance.

Dated: October 17, 2007.

Philip N. Hogen,

Chairman.

Norman H. DesRosiers,

Commissioner.

Cloyce V. Choney,

Commissioner.

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DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502 and 546

RIN 3141–AA31

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”

AGENCY: National Indian Gaming Commission (“NIGC” or “Commission”).

ACTION: Proposed rule.

SUMMARY: The proposed rule clarifies the terms Congress used to define Class II gaming. First, the proposed rule further revises the definitions for “electronic or electromechanical facsimile” and “other games similar to bingo.” The Commission defined these terms in 1992, revised the definitions in 2002, and proposed further revisions to the term “electronic or electromechanical facsimile” separate from this proposed revision. The Commission adds a new Part to its regulations that explains the basis for determining whether a game of bingo or lotto, “other game similar to bingo,” or a game of pull-tabs or “instant bingo,” meets the IGRA statutory requirements for Class II gaming, when such games are played electronically, primarily through an “electronic, computer or other technologic aid,” while distinguishing them from Class III “electronic or electromechanical facsimiles.” This new part also establishes a process for assuring that such games are Class II before placement of the games in a Class II tribal gaming operation. This process contains information collection requirements. The Commission has submitted the information collection request to OMB for approval.

DATES: Submit comments on or before December 10, 2007.

ADDRESSES: Mail comments to “Comments on Class II Classification Standards” National Indian Gaming