



**THE RED PAPER ON THE OCTOBER 24, 2007
NATIONAL INDIAN GAMING COMMISSION
CLASS II REGULATORY PACKAGE**

March 7, 2008

Introduction

On October 24, 2007 the National Indian Gaming Commission (“NIGC”) published proposed federal regulations on Classification Standards for Class II Games, Definition for Electronic or Electromechanical Facsimile, Minimum Internal Control Standards For Class II Gaming, and Technical Standards for Class II Games. The NIGC seeks to change the way the game of bingo is played when the game uses modern technological advances.

The unanimous response of the Tribal governments and every industry partner is one of outrage and disappointment. Threats of litigation are second only to voices of concern in the council chambers of the Indian nations because these regulations will roll back the collaborative efforts of the tribes and its gaming industry partners which have resulted in better education, health care, housing, and general welfare for Indian people. What federal law describes as the regulatory province of the Indian governments and regulatory agencies, with oversight from the NIGC, is being usurped by the NIGC without congressional approval.

Tribal nations are the oldest known local governments on the North American continent. Despite a troubled past relationship with the United States, new and positive policies and practices have emerged as a result of years of bi-partisan Congressional efforts, reasonable federal court decisions, hopeful Presidential policy, and the tenacity of Indian peoples. Occasionally, the federal government returns to its paternalistic roots, becoming unnecessarily heavy-handed and being destructive to native peoples. Against all pleading the NIGC first threatened and then did in fact issue on October 24, 2007, a package of proposed federal regulations they know will inflict substantial harm (the overall impact of which has not yet been determined) upon the economic and social fabric of Indian Country and damage American business interests which courageously partnered their business resources with tribes.

In 2007 the NIGC may need to be reminded how development of federal standards for gaming on Indian lands must be consistent with Congressional policy of promoting tribal economic development, self-sufficiency, and strong tribal governments. When gaming is already accomplishing these purposes and within the terms of the Indian Gaming Regulatory Act (IGRA), the NIGC should provide technical assistance to promote the tribal and industry efforts, not oppose them for reasons that only make sense within the walls of a federal agency located in Washington, D.C.

II. Background of Proposed Regulations

When Congress enacted the Indian Gaming Regulatory Act in 1988, it did so after a string of tribal court decisions affirming the inherent sovereign right of federally recognized tribes to conduct gaming on their lands within the boundaries of states which also conducted similar forms of gaming. After several years of litigation, a compromise was sought and the result was the IGRA. The first section of IGRA states:

The Congress finds that ...

- (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
- (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
- (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
- (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
- (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.¹

Congress declared that from the date of enactment of IGRA there would be only three forms of gaming on Indian lands and this gaming was to be conducted by federally recognized Indian tribes. These forms of gaming were classified as class I, class II, and class III. Class I gaming consists of traditional and social forms of Indian gaming, class II gaming is bingo, and (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. Class III gaming is defined as all forms of gaming that are not Class I gaming or Class II gaming. To conduct Class III gaming, an Indian tribe must have a approved authorizing ordinance and the gaming site must be located in a state that permits such gaming for any purpose by any persons, organization or entity. In addition, Class III gaming must be conducted pursuant to the terms of a tribal state compact entered into by the Indian tribe and the state. For those Indian tribes in states that did not favor class III gaming, class II became the sole source of gaming revenue for the tribal programs serving the tribal elderly, education, health, housing, and other services which have long been underfunded by the federal government.

During the late 1990's, the NIGC decided certain class II games resembled slot machines and therefore were not free from state regulation and payment of tribal gaming revenues to the

¹ 25 U.S.C §2701

state through a class III compact. The court battles which followed NIGC and Department of Justice actions cumulated in the year 2000 when the federal Court of Appeals ruled against the federal government and in favor of Indian tribes' use of modern technology to play the game of bingo. The federal courts highlighted the language in IGRA as plain and unambiguous when it authorized bingo to be played on Indian lands by the tribes with the use of modern technology. The courts instructed on how to distinguish bingo games from slot machines of the type described in the federal Johnson Act. In the leading case on the subject, *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, C.A.9 (Cal.),2000, the United States Court of Appeals covered the issues of machine, video, facsimile, slot machines, federal regulations, IGRA, bingo and more. In this landmark case, the federal Court of Appeals reaffirmed other court decisions which had come to similar conclusions. The Court of Appeals also upheld the plain language of the Congress and the congressional legislative record as superior in law to a federal administrative agency point of view. This case included this key language:

“The Government’s efforts to capture more completely the Platonic “essence” of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?²

* * *

IGRA defines class II gaming in relevant part as follows:

- (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)-
 - (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
 - (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
 - (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo,....”³

² U.S. v 103 Electronic Gambling Devices, 223 F.3d 1091, C.A.9 (Cal.), 2000.

³ 25 U.S.C. §2703(7)(A)

The present course of disagreement may have long been in the making but the official opening shots were witnessed in May, 2006 when the NIGC published in the Federal Register proposed Classification Standards for Class II gaming. This was followed by the publishing of Technical Standards on August 11, 2006. A month later on September 19, 2006, a public hearing occurred in Washington, D.C. where elected Tribal leaders, tribal gaming regulators, and gaming manufacturers all informed the NIGC how and why those regulations were more than economically burdensome. Knowledgeable speakers made consistent statements on how these proposed regulations if made final would be totally destructive to the class II industry and would cause severe economic harm to tribal governments.

In November 2006, the NIGC invited a group of class II gaming manufacturers in Montana to discuss the problem. Following this meeting, the NIGC in December of 2006 invited a technical working group from the Class II game designers and manufacturers to work with the NIGC's Tribal Technical Advisory Committee to revise its proposed Technical Standards into a document which made sense and described how a Class II gaming system should operate under legal, industry, and regulatory standards. The new working group immediately began meeting in working sessions which were attended by key NIGC staff and attorneys. On February 15, 2007, the NIGC withdrew the entire 2006 package and the work of the industry and the NIGC Advisory Committee continued as the Technical Standards had to be completely revamped. As the Tribal Advisory Committee and the technical working group came closer to completing their volunteer work it became obvious the NIGC's Minimum Internal Control Standards ("MICS") were also nonsensical and incorporated the existing workgroup with the NIGC's MICS Tribal Advisory Committee to begin to work to identify revisions to these additional federal regulations. The hopes were high as the collaborative effort of industry and government representatives was unparalleled in the experience of all attendees. These hopes were dashed in the October 24, 2007 publication of proposed federal regulations when four regulations were published. Two of the published regulations, the Technical Standards for Class II Gaming and the Minimum Internal Control Standards for Class II Gaming were those worked on diligently by the technical working group and the Tribal Advisory Committees. Two others, the Classification Standards for Class II Games and the Definition for Electronic or Electromechanical Facsimile, were known to be in the minds of the Chairman of the NIGC and the other two Commissioners and without exception or dissent, the technical working group consisting of industry executives, engineers, attorneys, regulators, and gaming experts along with both the NIGC Advisory Committees warned loudly of the impropriety of any such regulations which would contradict and mock the work done by the groups. This work was done by the best in the business and this acknowledgment of their experience and knowledge by the NIGC was regular. Somewhere, the NIGC came to believe they had in the course of one year gained the knowledge of all who were participating and everyone else had come to wrong conclusions.

In their November 7, 2007 letter to the United States Senate, the Class II manufacturers expressed their dismay at the publishing of these regulations. From that letter are these paragraphs:

“Significant human and economic capital was invested by the members of the Tribal Advisory Committees and the technical working group in drafting regulations that could be effectively implemented and enforced... We were disappointed when, in spite of this significant investment, the NIGC’s proposed Technical Standards and MICS contained material departures from the consensus documents.

Equally disappointing, and, in spite of overwhelming opposition, the NIGC included proposed Classification Standards and a revised Facsimile Definition in the published package of regulations. We believe that the proposed Classification Standards suffer from the same flaws as the 2006 version, and will likewise cause tremendous economic harm.”

The NIGC’s own Tribal Advisory Groups had written the Senate and House of Representatives the week before with similar, if not stronger protests. Their November 2, 2007 letter describes federal agency disregard for modern federal Indian policy. This letter has all the characteristics of those federal documents placed in historical records which provide the reader and insight into the negative aspect of United States behavior in its treatment of the nation’s indigenous peoples.

The Tribal Advisory Groups had this to say:

“We are disturbed that the NIGC has disregarded strong advice from its expert advisory committees. The NIGC published the proposed rules prior to the completion of an economic impact study that will likely show economic upheaval in the same manner as was shown by the last NIGC proposal in 2006. Furthermore, the NIGC failed to consult with Tribal Nations, despite its obligation to do so.

We hope when Congress begins its task of reviewing the advisability of these major rules, it will take the time to familiarize itself with the background of the rulemaking process we have been involved in, and the full implications of these major rules for Indian Country. To reiterate, we wish to make it known that the Tribal Advisory Committees cannot support the proposed regulatory package in its present form.”

III. Discussion of Proposed Regulations

The OIGA fully supports the expressions of indignation by the Tribal Advisory Committees and the gaming industry. The OIGA wants to express its extreme concern and opposition to the package of proposed regulations published by the NIGC on October 24, 2007. Our concerns extend to the procedural process whereby the proposed regulations were developed, the substantive provisions within those proposed regulations, and the extremely short time frames under which they are proposed to be finalized.

In addition, the OIGA wants to reiterate that the NIGC has not yet conducted government to government consultation with tribal governments, including OIGA members, in compliance with its own consultation policy. While NIGC has worked with its tribal advisory committee and industry representatives on two of the proposed regulations, this effort is no substitution for consultation with elected tribal government leaders and their representatives on the four proposed regulations. Until such a time as meaningful dialogue between sovereigns take place, the OIGA requests that these proposed regulations be withdrawn.

While not dismissing the problems of the Technical Standards for Class II Gaming and the Minimum Internal Control Standards for Class II regulations, unfortunately these two proposed regulations are not the most problematic. The Definition for Electronic or Electromechanical Facsimile and the Classification Standards for Class II Games regulations are the most destructive and paternalistic set of regulations that have been seen in many years.

A. Definition for Electronic or Electromechanical Facsimile

Of the regulations proposed by the National Indian Gaming Commission (NIGC) on October 24, 2007, perhaps the most chilling is that found in the proposed Facsimile definition. Unlike the proposed Classification Standards and Technical Standards, which create an entirely new regulatory scheme, the proposed Facsimile definition is a radical change of an existing definition. As worded, many believe it will create substantial criminal risk for anyone manufacturing, distributing, operating or playing a wholly electronic bingo game.

The facsimile definition is critical to Class II gaming, in that it provides a dividing line between what is Class II, and what is Class III. The line is critical, in that courts have held that games that are Class II are not subject to the limitations on gaming devices established by the Johnson Act, 15 U.S.C. §§ 1171 et seq.;⁴ while Class III gaming devices are subject to these provisions.⁵ The potential criminal exposure, coupled with significant uncertainty created by a myriad of requirements, is all but certain to have a substantial chilling effect on Class II gaming. It is our belief that any changes which create uncertainty and that increase the risk of criminal exposure are bad for Class II gaming, and should be rejected. Thus, we oppose the NIGC's proposed Facsimile definition.

⁴ *Seneca-Cayuga Tribe of Oklahoma, et al. v. National Indian Gaming Commission, et al.*, 327 F.3d 1019 (10th Cir 2003), cert. denied, 540 U.S. 1218 (2004).

⁵ See *Diamond Games Enterprises v. Janet Reno*, 230 F.3d 365 (D.C. Cir. 2000) (sometimes referred to as Lucky Tab II case). Also see *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), cert. denied, 540 U.S. 1229 (2004).

A.1 The Regulatory Certainty Created By The Current Facsimile Definition

Over the last five years, Class II gaming has experienced significant growth in Native American gaming markets. Relying on the certainty created by the existing Facsimile definition and the resulting stability in the types of games available, Class II gaming has attracted a whole new class of players. And perhaps best of all, Class II gaming operations have been able to attract hundreds of millions of dollars of investment at market rates; free from the penalties associated with high-risk investments.

The net result has been a dramatic increase in the safety, security and certainty of Class II games, with a corresponding increase in the profitability of Class II gaming operations. The competition created by the established Class III manufacturers has forced questionable manufacturers out of the Class II market, and has dramatically improved the capabilities of the remaining Class II games - making features like on-line accounting and industry-standard security features the norm on Class II gaming devices. Dealing with established manufacturers who are licensed in many Class III jurisdictions, Native American operators and their customers are far more certain about the integrity of the gaming platforms they offer in Class II gaming facilities. Thus, the certainty of the existing regulations has done much to improve the quality of games available in the Class II market.

And the certainty has attracted institutional investors to the Class II arena. These investors have provided hundreds of millions of dollars in financing for Class II gaming operations at "market" rates, without the financial charges normally associated with high-risk investments.⁶ Such investments have allowed tribal operators to make long-term investments. Similarly, institutional investors have also provided financing for Class II gaming equipment. The result has been more robust and more secure platforms that protect not only the properties where they are installed, but also the fiduciary rights of the institutional investors. This financing, for both the facilities and games is yet another way the current certainty has done much to improve the safety, security and integrity of Class II gaming.

A.2 Increased Criminal Exposure For Manufacturers, Operators And Players

The Facsimile definition has always played a prominent role in Class II gaming. Focusing on games played in the wholly electronic format, the definition has been critical to determining whether a game is Class II or if it is a facsimile of a Class II game, which is in fact Class III.

The NIGC promulgated the current definition in 2002, which states:

⁶ One should note that these investments have come prior to the approval of Class III gaming in States like Oklahoma, where the Cherokees secured upwards of \$100 million in financing for their Catoosa facility prior to the passage of State Question 712 in 2004; and in States where Class III gaming is impractical or not permitted; *see* the Kickapoo Traditional Tribe of Texas' Lucky Eagle Casino development in Eagle Pass, TX and the Blackfeet Tribe's Glacier Peaks Casino in MT.

§502.8 ELECTRONIC OR ELECTROMECHANICAL FACSIMILE.

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.⁷

The definition has proven useful, in that it makes clear that bingo, when played in the wholly electronic format and resulting in competition among players – rather than against the machine – is not a facsimile for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. This definition has been cited favorably by Federal Courts determining game classification issues,⁸ and has created a substantial amount of certainty in Class II gaming; certainty that has resulted in the substantial growth in Class II gaming that is detailed above.

Unfortunately, the proposed Facsimile definition would radically change the current stability in Class II gaming. Rather than ensuring that bingo games that require players to play against each other are not a facsimile, the proposed definition take a different tack.

§ 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.⁹

Thus, the proposed definition declares that all games played in an electronic or electromechanical format that incorporate all of the fundamental characteristics of the game are facsimiles under this language; unless they meet the requirements of part 546 – the proposed Game Classification standards.

While the change appears to be minute on paper, in practice it is mammoth. By requiring compliance with part 546, a game must comply not only with the game classification standards, but also with the technical standards as proposed in part 547 and the proposed Minimum Internal Control standards as proposed in parts 542 and 543, since they are

⁷ 57 FR 12392, Apr. 9, 1992, as amended at 67 FR 41166, June 17, 2002.

⁸ See, *Seneca-Cayuga Tribe of Oklahoma, et al. v. National Indian Gaming Commission, et al.*, 327 F. 3d. 1019 (10th Cir 2003), cert. denied, 540 U.S. 1218 (2004); *Diamond Games Enterprises v. Janet Reno*, 230 F.3d 365 (D.C. Cir. 2000). (Sometimes referred to as Lucky Tab II case) and *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), cert. denied, 540 U.S. 1229 (2004) One cannot overstate the importance of the favorable Court opinions citing the Facsimile definition. Established Class III manufacturers did not enter Class II gaming until after the Seneca-Cayuga and Lucky Tab II decisions were reached. Thus, agency action alone has not been sufficient to create stability. It has taken agency action that has been vetted by the Federal Judicial system to achieve the certainty necessary for growth.

⁹ 72 FR 60482, October 24, 2007.

incorporated into part 546.¹⁰ Thus, there is far more involved in the facsimile determination under the proposed definition than is involved under the current definition.

The ramifications are significant for, as was noted earlier, the determination that a game is a facsimile makes it a Class III game – and subject to the terms of the Johnson Act. Under the proposed definition, violations would be subject to more than the NIGC’s civil penalties. They would also be subject to criminal prosecution for violations, and would face enforcement not just from the NIGC, but also from the Department of Justice and local United States Attorneys.

This is a radically different approach than that taken by the existing definition, and one that results in a dramatic increase of potential criminal exposure for gaming manufacturers, operators and gaming customers. The ramifications of this change are certain to have a dramatic impact on the Class II gaming industry.

A.3 Loss of Certainty

Unfortunately, the proposed definition destroys the certainty that currently exists. As was noted above, modifying the plain language of the existing definition with language that requires an intense examination of multiple NIGC standards to determine whether a game is a Facsimile can create some outrageous results. For example, a game that meets every requirement of the proposed language, and that has a 3 foot by 3 foot bingo card would be deemed a Facsimile under the proposed definition if it failed to properly display the phrase “this is a game of bingo.” Such a result may appear nonsensical, but it is easily reached by a clear reading of the proposed definition’s language. Similarly, a game that has incorrect financial reporting that doesn’t meet the MICS requirements or a financial instrument compartment that doesn’t meet the technical standards would also be found a Facsimile, even if it met every other Classification, MICS and Technical Standard requirement. Almost all would argue these are ancillary issues that do not affect the underlying game, but they would affect the determination of whether a game is a Facsimile under the NIGC’s proposed definition.

Worse, the determination of whether a game is a Facsimile becomes based on a fluid standard. Changes in the Technical standards, MICS and/or Classification standards could all impact whether a game is Class II or Class III. Passage of new regulations would similarly impact games. For example, if the Commission passed a Color Standard, that allowed only pink backgrounds on bingo cards, it would impact whether a game is a Facsimile under the proposed definition.

Furthermore because the determination that a game is a facsimile has Johnson Act ramifications, manufacturers and operators must examine the impact through a completely different prism than a scheme that simply imposes civil fines. As manufacturers and operators review the language, they will have to look at not only the NIGC response, but also the potential response of the Federal Department of Justice and also that of local United States Attorneys. Thus, the analysis of serious manufacturers and operators will be forced to consider

¹⁰ See §547.8 (a) of the proposed regulations, which requires the independent testing laboratory to certify that the tested games meet not only the Classification standards but any other applicable standards promulgated by the Commission.

the possibility that a local prosecutor, with little or no understanding of gaming, could bring criminal charges for even the most insignificant violations. While almost no one believes this was the NIGC's intent in drafting the proposed Facsimile definition, it is clearly a consideration manufacturers, operators and investors will be forced to make before participating in wholly electronic or electromechanical Class II gaming.

Finally, uncertainty affects the ability in obtaining investments for Class II facilities which was quite difficult prior to certainty being established in Class II gaming. Very little money was available for Class II gaming, and what was available carried the penalties associated with high-risk investments; requiring revenue sharing and other highly taxing mechanisms to acquire the funds. If uncertainty returns, it is highly likely that Tribes will find it much more difficult to obtain financing. Obviously, the losses from the regulatory uncertainty will be devastating for the Class II industry. But perhaps more disconcerting is the likely replacement options for the Tribes losses.

A.5 The Devastating Impact Caused By The Loss Of Certainty

As was noted above, the likely outcome created by the proposed Facsimile definition is a loss of stability. Yet the definition alone will not eliminate the Class II gaming market. Class II gaming is played throughout the United States, in markets without Class III gaming, in conjunction with Class III gaming, and as an alternative to Class III gaming. Certainly, in some markets the easy solution will be to convert from Class II to Class III; which would allow tribal gaming operators to maintain the standards that have been created under this period of Class II certainty.

Unfortunately, this option is not available to all Tribes. Some operate in states where casino style Class III gaming is not permitted. Others operate in states where the limitations on Class III are so severe as to make the activity unprofitable. And some simply choose to operate Class II gaming so they can avoid the jurisdiction and whims of elected State officials that are allowed to participate in the regulation of Class III gaming through Tribal-State compacts. Whatever the reason why they operate Class II gaming, the impacts are significant. The NIGC's own economic impact study shows that Class II gaming has become a multi-billion dollar business in the United States.¹¹

And the revenue derived from Class II gaming has become critical to Tribal economies. In addition to providing jobs for Tribal members, Class II gaming facilities create revenue used to provide social services for members, create educational opportunities for their youth, fund business ventures in other areas, and underwrite the costs of self-government. The uncertainty created by the proposed Facsimile definition will not remove these needs - if anything, it will accentuate them as Tribes struggle to maintain the standards they currently enjoy. Thus, Class II gaming operators will be forced to alternatives; and follow a path that existed prior to the certainty created by the current facsimile definition.

And the uncertainty creates an environment where financing costs will become

¹¹ See The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations by Alan Meister (February 1, 2008).

tremendously expensive. Prior to the certainty created by the current definition, when financing could be acquired, projects would often require participation in the project, in addition to the interest. Often, tribes had to turn to alternative sources of financing, or pledge tribal collateral, to even have their financing considered. Such an environment dramatically increased costs, limited the size of projects to what could be financed, rather than what made sense for the market, and resulted in a narrow, short-term view of the investment to justify the significant risks being taken. There is little doubt that the uncertainty created by the NIGC's proposed Facsimile definition would result in a return to these difficult financing options.

B. 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"

The Game Classification regulations are a new proposal from the Commission, and purport to define what is a Class II game. Unfortunately, they go far beyond the bounds of IGRA and the established court decisions, and add a significant number of additional requirements to the play of the game of bingo.

These changes, if enacted, will significantly impact the playability of Class II games, and even the Commission's own economic impact studies have indicated the changes will have a devastating economic impact on the Tribes and the communities in which they operate. And as drafted, the proposed Classification regulations significantly impact Tribal sovereignty by reducing the primacy of the Tribal regulator and giving the responsibility for game approval to gaming laboratories. Combined, it is the opinion of the OIGA that the proposed Classification standards will spell the death knell of Class II gaming.

B.1 Impact on the playability of Class II gaming systems

It is the opinion of the OIGA that, as drafted by the Commission, the proposed Game Classification regulations have a profound impact on the playability of Class II gaming systems. By adding a number of additional requirements to the play of the game of bingo, the proposed regulations add additional time to gameplay and require player actions that will dramatically impact the overall player experience when playing the game. For example, the proposed standards require that there be either a 2 second delay prior to the start or a minimum of 6 players before a bingo game can begin;¹² require the game to continue if a player "sleeps" the game-winning pattern;¹³ require the game to remain open an unlimited length of time to allow a player to cover, or to declare a game void and return wagers to players;¹⁴ requires prizes to be

¹² See §546.6 (a) of the proposed regulations.

¹³ See §546.5 (j) of the proposed regulations.

¹⁴ See §546.5 (l) of the proposed regulations.

held until the game-winning prize is won;¹⁵ and require all players in the game, and not just the winning player, to daub the bingo card.¹⁶

These provisions, combined, have a dramatic impact on how the games will be played. Under the proposed scheme, there would be times the games are played quickly, and times that games would drag on for significant periods. A requirement that every player daubs creates situations where literally hundreds of players could be held hostage if just one player leaves prior to daubing. Most manufacturers are concerned that the requirements will result in a game that is inconsistent, and that takes too long to complete. The manufacturers believe that this inconsistent game play will have a dramatic impact on revenue; as players will be uncomfortable playing games that do not follow a predictable, consistent pattern. Thus, the manufacturers have expressed that the format created by the proposed standards will make it essentially impossible to create an entertaining game.

B.2 Impermissible infringement on Tribal Sovereignty

The OIGA believes that in drafting the proposed Game Classification regulations, the Commission has gone far beyond the powers it is granted under IGRA, and created an impermissible infringement on tribal sovereignty. The attack on Tribal sovereignty comes from three fronts - a direct attack, that replaces tribal regulators as the determiners of a game's classification status with a private, for profit test lab; an ancillary attack that assaults the tribe's right to regulate Class II gaming by establishing requirements that infringe on that process; and an indirect attack that makes Class II gaming economically unviable and removes the choice - granted to the Tribes in IGRA - of whether to play Class II games.

The frontal attack on Tribal sovereignty is found in §546.8 of the proposed Classification Standards, which requires a Tribe, game supplier, or game developer to submit gaming systems to a recognized lab to determine whether a game is Class II. The gaming lab cannot be owned by the tribe,¹⁷ meaning that Tribes cannot reach their own conclusions as to whether a gaming platform meets the requirements of a Class II gaming system; but must instead rely on the results of a private, for profit, gaming lab. Such a result runs contrary to the powers granted the Tribes in the *Cabazon* opinion; to offer and operate gaming outside of State and Federal jurisdiction; and codified in the Indian Gaming Regulatory Act, which makes Tribes the primary regulator of tribal gaming and the arbiter of a game's Class II status.

The numerous additional requirements created by the regulations, like requiring the player terminal to say "this is a game of bingo,"¹⁸ that require the ability to disable entertaining

¹⁵ See §546.6 (g) of the proposed regulations which is poorly worded, but the likely interpretation appears to be that interim prizes may be awarded prior to the game-ending pattern being achieved; but that they cannot be claimed until a game ending pattern is awarded.

¹⁶ §546.5 (h) of the proposed regulations.

¹⁷ See §546.8(b)(4) of the proposed regulations.

¹⁸ See §546.4 (d) of the proposed regulations.

displays,¹⁹ that require at least six players to play a game or a 2 second delay before the game can begin,²⁰ and the numerous other restrictions that go beyond the requirements of a Class II game as defined by IGRA and interpreted by numerous Federal courts of law are further assaults on tribal sovereignty. IGRA makes the tribes the primary regulator of Class II gaming, bound only by the requirements of the Statute; and the proposed regulations create extra-statutory requirements that further limit tribal sovereignty.

And as a practical manner, the regulations create a framework in which Class II gaming will no longer be financially viable. Such a framework negates the Tribe's ability to offer Class II gaming – a right they were expressly granted in IGRA – and is a further affront to Tribal sovereignty. Such an infringement is significant, as Congress clearly provided Class II gaming as a means for Tribes to avoid taxation and interference from the State and Federal governments. It is a significant and important right, but one that is rendered worthless by a proposed standard that removes the financial viability of Class II gaming.

B.3 The “Need For Clarity” In Class II Gaming

Throughout the regulatory drafting process, the Commission cited a need for “clarity” as the rationale for creating the proposed standards. Unfortunately, the proposed standards do just the opposite. Filled with loopholes, inconsistencies, and confusing language; the proposed standards muddy the regulatory waters and create a framework that is almost impossible to regulate.

The proposed document has a potentially huge loophole in the section defining the scope of the regulations. It limits the regulatory scope to games played solely with electronic, computer or other technologic aids.²¹ Such a limitation creates a significant gap in the standards, in that a game incorporating an element that is not electronic, computer or a technologic aid would fall entirely outside the scope of the regulation. For example, if a game designer came up with a device that incorporated something like a paper bingo card, it would fall outside the scope of the regulations as they are currently worded.

The proposed document also has a number of inconsistencies. While §546.2 proclaims that the regulations apply only to games played solely in the electronic format; a pull-tab game is required to use a pull-tab printed on paper or displayed in some other tangible format.²² These provisions are clearly in conflict. A similar confusion is created by the language describing sleeping a bingo, in which a player forfeits their prize if they don't daub their bingo card within the time allowed by he game;²³ but also allows a player to “catch up” numbers they

¹⁹ See §546.4 (o) of the proposed regulations.

²⁰ See §546.6 (a) of the proposed regulations.

²¹ See §546.2 of the proposed regulations.

²² See §546.7 (a) of the proposed regulations.

²³ See §546.3 (e) of the proposed regulations.

have “slept” to claim a game ending prize.²⁴ While both bingo games and pull-tab games can have alternative displays, the proposed language requires that the bingo games be able to disable the alternative display,²⁵ but the pull-tab games do not.²⁶

The document is also plagued with problems where provisions are not clear, and can be read to conclude multiple results. For example, §546.6(i) refers to “the probability of achieving the game-winning prize pattern or progressive prize pattern. . . .” It is unclear from this language whether a game could have a progressive prize awarded as the game-winning pattern. In all likelihood, the drafters did not intend to prohibit the use of a progressive prize as the game-winning pattern, but the language can easily be read to prohibit the combination of the two. Other confusing language can be found in areas like the language that describes interim prizes²⁷ and consolation prizes²⁸ – which could be read as definitions, or fairly significant design constraints.

Between the loopholes, inconsistencies and confusing language, the proposed document does little to create “clarity” in the Class II market.

More importantly, the OIGA believes that the supposed need for “clarity” is disingenuous. IGRA defined Class II gaming, the Commission has been able to apply the definition in numerous game determinations and enforcement actions, and a number of Federal courts – without any gaming expertise – have been able to apply the definition and reach conclusions, all without citing a need for more “clarity.” Thus, it is the position of the OIGA that additional regulations are not needed to clarify the existing definition of bingo as provided by IGRA.

B.4 Regulations Based On Technology Rather Than Game Characteristics

The proposed classification standards look to technology rather than inherent game characteristics to establish a regulatory division, and create an inherently unfair regulatory structure. Because the focus is on technology, the framework prohibits a number of activities in the electronic, computer or technologically aided medium that have been used in traditional paper bingo for years, and that would continue to be allowed in traditional games under these regulations. Such a distinction simply cannot be supported under IGRA; under whose language bingo is treated the same. If activities are allowed in paper, they should be allowed in technologically aided games; otherwise, they should be denied in both. The failure of these proposed regulations to treat bingo the same whether aided or not creates a new class of games that is impermissible under IGRA.

²⁴ See §546.5 (i) of the proposed regulations.

²⁵ See §546.4 (o) of the proposed regulations.

²⁶ See §546.7 (f) of the proposed regulations.

²⁷ See §546.4 (k) of the proposed regulations.

²⁸ See §546.4 (l) of the proposed regulations.

A prime example is the requirement that prizes be awarded solely on the outcome of the game of bingo.²⁹ Under this language, technologically aided games cannot use wheel spins, random picks or other mechanisms to award prizes to bingo players; yet these techniques are used today in traditional paper bingo games (in games like “pick a pet,” etc); and would presumably still be allowed in traditional paper bingo games under the proposed regulations since they do not apply to games played without a technologic aid.³⁰

In many traditional paper bingo games, players can continue to buy cards for a game after play begins – the issue is traditionally a house rule – and based on the language in §546.2 it appears the practice would continue to be permitted in traditional paper bingo under the suggested scheme. But under the proposed standards, technologically aided games would require that all cards be purchased prior to the start of the game.³¹

And perhaps most egregious bifurcation of the proposed standards is the requirement that, when played in the wholly technologically aided format, that all players be required to daub as an indication of their participation in the game.³² The OIGA is aware of no unaided game played anywhere that currently requires, or that has ever required, all players to daub to indicate their participation in a game. Rather, the player’s purchase of a bingo card has traditionally been sufficient to “participate,” and whether a player chooses to daub or not is irrelevant to the outcome of the game for other players.³³

B.5 Unrealistic and Impractical Regulations

The OIGA believes that certain provisions of the proposed standards create requirements that are impractical to implement from an operational standpoint. In two different sections, the proposed standards require that the game be voided and players be refunded monies or the game left open indefinitely in the case of a player not claiming the game-winning pattern.³⁴ While the language is clear, the ramifications are not. It is likely that every instance where no one has claimed a game-winning prize would be the result of all the players leaving their player interfaces. The OIGA does not see how a facility could refund monies to players who have left their devices, and possibly left the building.

Traditional paper bingo has dealt with such situations in a number of ways, with a common practice being to pool the forfeited prizes for future distribution as prizes or other awards to players. This is a practical solution that can be implemented in cases where all players have left the game. Denying operators of games played in the solely electronic format a

²⁹ See §546.4 (n) of the proposed regulations.

³⁰ See §546.2 of the proposed regulations.

³¹ See §546.4 (a) of the proposed regulations.

³² See §546.5 (h) of the proposed regulations.

³³ The only known ramification is that the player who does not daub will not win.

³⁴ See 546.5 (l) of the proposed regulations, covering most games, and 546.6 (n) of the proposed regulations, covering ante-up format games.

solution such as this, or something more practical than that in the proposed standards, makes implementation all but impossible.

B.6 The Grandfathering provision

While the Commission has placed significant emphasis on the grandfathering provision of the proposed standards, the OIGA believes it has no value. It is poorly worded, and provides little protection for Class II games that are currently being played.

The language cited as a “Grandfathering provision” is confusing, at best. Found in §546.10 (b), it provides that games covered by Section 546.1 et seq and in play 120 days prior to the effective date of the regulation may continue to be operated for 5 years from the effective date. As worded, there is no clear exemption for games that do not meet all of the requirements of Section 546 – rather, one could easily conclude that it only allows games that are fully compliant.

Even if one were to receive a favorable interpretation of the language, that it does allow games that are not fully compliant, the preamble of the proposed standard makes clear that the protections are minimal. It states, “. . .the proposed regulations make clear that this grandfather provision will not provide a safe harbor to those machines that could be considered Class III under any standards.”³⁵ Thus, there is no protection from being declared a facsimile, or from the resulting Johnson Act enforcement, in the proposed grandfathering language.

The failure to provide an adequate grandfathering provision has significant ramifications for Tribes and Tribal gaming operations. Without adequate grandfathering or delayed implementation of the proposed standards, hundreds of millions of dollars of investment in gaming equipment and gaming systems will be lost.³⁶

Manufacturers have indicated it could easily take up to 18 months to create games that will comply with the new requirements. Without a delay in implementation, Tribes and Tribal gaming operators will be left for a significant period without any games that can be offered. And even if games can be developed more quickly, Tribes and Tribal gaming operators would be required to replace an estimated 50,000 Class II player terminals in just 120 days. Replacing that many games in that short of a window is practically impossible; and will create a situation in which Tribes will be forced to go dark for some period of time – with no games to offer – and suffer both immediate losses from the loss of revenue, and long term losses from the loss of customer confidence.

B.7 Extra-statutory Requirements

The OIGA believes the proposed classification standards go far beyond the Class II bingo definition in IGRA, and create a number of “extra-statutory” requirements that have

³⁵ See, Federal Register, Vol. 72, No. 205, Wednesday, October 24, 2007, page 60487

³⁶ Assuming 50,000 games at just \$7,500 per game (a below market value figure), the investment in Class II devices is more than \$350,000,000.

nothing to do with bingo. These provisions infringe on the right of Congress to establish regulations governing the relationship between Tribes and the Federal government, and have significant ramifications for Tribal gaming operations.

The proposed regulations require a label on player terminals that says “this is a game of bingo,”³⁷ that player terminals be able to disable any entertaining alternative displays,³⁸ that there be a minimum of 6 players in a game of bingo, or an up to 2 second delay from the start of the game,³⁹ a requirement that all players – winners, losers, everyone playing – daub all cards before a winner can claim his prize;⁴⁰ a requirement that the bingo card be at least 2” x 2”,⁴¹ and a requirement that a bingo game meet the technical standards and Minimum Internal Control Standards in order to be considered Class II under the proposed Classification standards.⁴² None of these requirements are essential to the play of the game of bingo; yet the regulations create a framework in which a game is not Class II if any of them are missed. Thus, a game that meets every other requirement, but doesn’t say “this is a game of bingo”⁴³ would not be a Class II game under the proposed regulations.

Such an outcome cannot be supported by the court decisions interpreting IGRA, and clearly goes far beyond the limitations intended by Congress. It cannot be supported in the proposed regulations.

C. Minimum Internal Control Standards for Class II Gaming

The OIGA understands that after the joint effort between the NIGC, the gaming industry and the tribal participants, including the Tribal Advisory Committee in the re-write of the technical standards that then the inconsistencies between the result of this work and the existing MICS required new MICS regulations to be promulgated for consideration. However, the proposed regulations that were published by the NIGC are not as the version agreed upon by the Tribal Advisory Committee. In light of that fact, the OIGA requests that following from the NIGC:

1. Withdraw these regulations and if you choose to republish, then publish the version agreed upon by Tribal Advisory Committee;
2. Explain why this document is not published as guidelines or at least why the document does not provide tribes the ability to adopt alternative procedures or to ensure that the intended purposes of the document are met and in most cases exceeded;

³⁷ See §546.4 (d) of the proposed regulations.

³⁸ See §546.4 (o) of the proposed regulations.

³⁹ See §546.6 (a) of the proposed regulations.

⁴⁰ See §546.5 (h) of the proposed regulations.

⁴¹ See §546.4 (b) of the proposed regulations.

⁴² See §546.8 (b)(3) of the proposed regulations.

⁴³ Or other language as defined by §546.4 (d) of the proposed regulations.

3. Take into consideration the practical realities of time and resources, both financial and human, that are needed to implement a new regulation when publishing an effective date; and
4. Provide meaningful consultation to tribal governments on this proposal before going forward.

D. Technical Standards for Electronic, Computer, or Other Technological Aids Used in the Play of Class II Games

The OIGA recognizes and appreciates the collaborative efforts of the NIGC, the gaming industry, and the tribal participants by the improvement of the proposed regulations on technical standards over what was published in 2006. The betterment over the original proposed version is by a level of several magnitudes. However, the OIGA still feels as though the proposed technical standards contain fatal flaws should be changed as they would be more useful if published as guidelines.

For example, the preamble of the IGRA points out that “Indian Tribes and the NIGC share regulatory authority over Class II gaming, from the tribal perspective it appears with the proposed Technical Standards for Class II games, the NIGC oversteps its stated authority and ignores 25 U.S.C § 2701(5) of the IGRA which states, “Indian Tribes have the exclusive right to regulate gaming activity on Indian Lands if the gaming activity is not specifically prohibited by Federal law and is not conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity. “

Even more problematic is that the proposed standard requires compliance with “applicable classification standards”, which means that if the classification standards aren’t supported then these standards also cannot be supported as now written.

Another example is the recall of alternative displays provision, which is unnecessary and goes beyond legal requirements. The alternative displays are for entertainment purposes only and have nothing to do with the outcome of the game. The issue of recalling of alternative displays should be left to the discretion of each individual tribal gaming regulatory agency as the primary regulators.

Finally, the publication of technical standards has the chilling effect of limiting technology to a point in time, which goes against the intent of the IGRA. Indian tribes should not have to again be in a situation where we have to remind the very federal government agency created to help us that the Congress allowed for the use of technology by the tribes. The Senate Report on IGRA made a distinction, or “bright line” if you will, between an electronic “aid” and an electronic “facsimile”. The tribes worked with the Senate and understood their Report when they put in the official record of the Senate these findings:

“[T]ribes should 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....”⁴⁴

IV. NIGC’s Economic Impact Study

The OIGA reacts with horror to the justifications announced by the NIGC for continuing on the path of finalizing the new regulations after reviewing the February 1, 2008 economic impact study on the proposed class II gaming regulations. The NIGC proposes a federal policy where an intangible concept of “stability” trumps thousands of lost tribal member jobs, billions of dollars in lost gaming revenue, regulatory burdens on tribal gaming commissions, and the other devastation described further in the economic impact study. Although the study looks only at the immediate impact to tribes, and doesn’t consider the effect of lost revenue on the entire communities where the gaming facilities are located, the numbers are still horrific – the study estimates the impact to be from \$575.9 million to \$1.8 billion per year.

In contrast, the OIGA cannot understand how a federal agency takes the position of the NIGC which is so contrary to “promoting tribal economic development, self sufficiency, and strong tribal governments”, the declared purpose of the IGRA. The NIGC policy is an attempt to change the law through regulations. The OIGA protests this course of action of the NIGC. We support the declared policies and purposes of Indian Gaming Regulatory Act and oppose any bureaucratic movement which undermines these goals. The OIGA understands gaming regulation as a concept and how regulations should function. The regulations should not stray from primary regulatory policy which include: operational and system security where functions and interactions are protected from unauthorized alteration; integrity of the gaming systems so they will do what they are designed to do without malfunction; protection of tribal assets; assuring the gaming public of the fairness of their entertainment experience; and other normal regulatory practices. The Indian gaming industry knows how to adapt to the changing market and new technologies in a manner which is legal and exemplary. The NIGC should not revive economic and social oppression as federal practice in United States-Indian relations.

V. Conclusion

In closing, the proposed regulation published by the NIGC on October 24, 2007 constitutes a sea of change in Class II gaming and OIGA is very disappointed that the NIGC has made these proposals without conducting government to government consultation with our member tribes. Despite some potential latent ambiguity in the language of the IGRA when originally enacted, numerous Federal District and appeals courts have provided a rich interpretation of that language – an interpretation that is consistent with the express intent of the IGRA to allow tribes the “opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum

⁴⁴ See S.Rep. No. 446, 100th Cong., 2d. Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079.

flexibility” to advance economic self sufficiency. This proposal, that will cut back on some of the most important technological improvements, abandon hard-won court victories, and impose economic hardship, should not be made without proper consultation with tribes, which has to entail full disclosure of the proposed rule in conjunction with the study of its economic impact and meaningful dialogue between sovereigns. We urge our members to review these proposed regulations and respond with their comments via telephone calls and written letters to the National Indian Gaming Commission.