

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

Commission, Suite 9100, 1441 L Street, NW., Washington, DC 20005, Attn: Penny Coleman, Acting General Counsel. Comments may be transmitted by facsimile to 202-632-7066, or mailed or submitted to the above address. Comments may also be submitted electronically to [classification\\_standards@nigc.gov](mailto:classification_standards@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:**

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**I. Introduction**

In writing and proposing this rule, the Commission has attempted to be mindful of the language of IGRA, Congress's intent, IGRA's legislative history, relevant court cases, and the essential need of the tribes for a broad, flexible and legally sustainable scope of Class II gaming. Class II was the basis on which Indian gaming was built. Since the enactment of IGRA in 1988, Indian gaming has grown into a \$26 billion business, perhaps far eclipsing any limits which Congress may have envisioned. Although an estimated 90% of this gross gaming revenue is generated by compacted Class III gaming, Class II remains significant to tribes throughout the country.

For some tribes with Class III gaming compacts, Class II is a vital supplement, long patronized and preferred by some clientele. In other cases, sadly, some states fail and refuse to compact with their tribes for Class III play, notwithstanding their legal sanction of Class III gaming activities elsewhere within those states or their tolerance of widespread unsanctioned Class III activities. Tribes in that situation are left to make the most of Class II gaming and have operations that are, or were, places where the distinction between Class II and Class III has become the most blurred and where clarity is most needed. Further, as tribes negotiate with states for Class III compacts, they and the states need to know that there are viable Class II games that tribes may utilize if no agreement is reached.

As observed below, the statutory language of IGRA lacks clarity when it makes "computer and electronic and technologic aids" Class II but places "electronic facsimiles of games of chance" in Class III. However, some of

the Act's legislative history sheds light upon Congress's intended goal.

In the House and Senate floor debates on IGRA, several proponents of the legislation described the distinction as that between "bingo" (Class II) and "casino gaming" (Class III). See 134 Cong. Rec. H8157. While "casino gaming" likewise lacks a crystal-clear definition, those who spoke associated the term with gambling halls filled with slot machines, venues separate and distinct from the bingo halls of the 1980's.

It further appears from the debates that a basis for making this the dividing line between Class II and Class III was the complexity and regulatory difficulties associated with slot machines and casino gaming. See 134 Cong. Rec. H8157, 134 Cong. Rec. S12643. Some argued that only states—then the only governments experienced with the conduct and regulation of such activity—were up to the task of regulating casino gaming, and thus casino gaming needed to be compacted.

Much has changed, of course, since those debates in 1988, not the least of which is the sophistication and excellence of the tribes' own gaming regulation. Tribes spend hundreds of millions of dollars annually regulating their gaming, both directly, through their own commissions, and indirectly, by funding the regulation done by states and the NIGC. Nonetheless, the distinctions and classifications established in IGRA in 1988 still bind the Commission, and the proposed rule seeks to identify and clarify the place at which Congress intended to separate Class II from Class III.

What is abundantly clear from a study of the Act's language and the Act's legislative history is that Congress intended to distinguish between uncompacted and compacted gaming. If that separating line is not clear and identifiable, Congress's intention will not be fulfilled.

Since the Act's adoption in 1988, the world has changed, and computerization has transformed whole sectors of our economy and society, including gaming. Those advances challenge the legislative language that pre-dates them. Nevertheless, that language continues to govern these distinctions. Unless or until that language or the mission of the NIGC—in part to promulgate Federal standards for Indian gaming—is changed, the Commission's interpretations must be based on them.

The other legislation, of course, which applies to the use of gambling equipment on Indian lands is the Johnson Act. See 15 U.S.C. 1171. Since

it was enacted in 1953, the Johnson Act has provided that there could be no "gambling devices" in Indian Country, and the term "gambling devices" was thereafter broadly interpreted.

The passage of IGRA in 1988 changed this in two ways. "Gambling devices" could be used on Indian lands if they were used pursuant to Class III tribal-state compacts, and tribes could use computers and electronic and technologic aids in the play of Class II bingo and similar games.

As Indian gaming grew and the Indian gaming industry developed under IGRA's framework, tribes increasingly turned to technology. When electronic and technologic features were introduced in the absence of a tribal-state compact, some were viewed by Federal investigators and prosecutors as "gambling devices." The Ninth Circuit held that an all-electronic form of pull tabs to be an electronic facsimile game of chance, notwithstanding the argument that players were playing against other players and not against the machine they were using. The electronic replication of the traditional Class II pull tab game was deemed a Class III electronic facsimile and hence prohibited on Indian lands in the absence of a compact. See *Sycuan Band of Mission Indians v. Roach*, 54 F.3d 535 (9th Cir. 1995).

By contrast, in a series of decisions involving an electronic bingo game called MegaMania, courts considered electronic, computerized player stations, which interconnected a minimum of 12 players and displayed bingo cards and bingo balls to them. Each game took from two to three minutes to play. Again, those responsible for enforcement of the Johnson Act challenged the player stations as "gambling devices" requiring a compact for play. These challenges failed. Accordingly, the player stations were indeed only "aids" to the play of bingo, which Congress provided for in IGRA as Class II, and not electronic facsimiles of a game of chance. Those courts, however, were careful to note that their conclusions were limited to the facts of the cases presented. See *U.S. v. 162 Megamania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000), *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000).

Similarly, in a series of cases dealing with dispensers of paper pull tabs known as Lucky Tab II and Magical Irish, the enforcers of the Johnson Act became concerned when the manufacturers of these machines added video displays to the machines. The video displayed winning and losing pull tabs by depicting slot machine-type

reels and showing winning and losing combinations. These dispensers, it was said, were “gambling devices” and could only be played in a compacted Class III arrangement. The courts disagreed. Notwithstanding the use of the entertaining displays to show slot machine-like results, those displays were not essential to the game. The play of the game was “in the paper”—it was the pull tabs themselves, and only the pull tabs, that determined the outcome of the game. Thus, these courts concluded, the electronic dispensers were only aids to the play of the game of pull tabs and permissible without a Class III compact. Again, the courts limited their holdings to circumstances before them. *See Diamond Game Enterprises v. Reno*, 230 F.3d 365 (DC Cir. 2000), *Seneca-Cayuga Tribe of Okla. v. NIGC*, 327 F.3d 1019, 1031 (10th Cir. 2003).

Thereafter, these technologies—interconnected bingo player stations and slot machine-type video displays (not determinative of results)—were coupled, and currently most electronic bingo systems employ such technology. Most such systems display the results of the bingo game in an electronic bingo card on the equipment’s video display.

Such technological advances have greatly increased the speed with which bingo is played and have made the experience of playing very similar to the experience of playing conventional slot machines.

In adopting IGRA, Congress observed that while computers, electronic and technologic aids may assist the play of Class II games, a Class III facsimile results if those electronic aids incorporate all of “the fundamental characteristics” of the Class II games. *See S. Rep. No. 100–466*, at 8 (1988). This, the Commission believes, is precisely the issue raised by the proliferation of so-called “one touch games”—inter-connected electronic bingo player stations with which players initiate and complete play of a bingo game with the single touch of the screen or a button.

In such instances, the equipment has ceased to be an “aid” to the play of the game, and has become one of those “electronic facsimiles of games of chance” which Congress placed in Class III. When the equipment automatically, electronically automates the play of the game and the players’ participation in the game, the Commission believes that the play is no longer “outside” the equipment and that the electronic equipment can no longer be characterized as merely an aid. All player attention, discretion, and

interface has been automated by the equipment.

Beyond this, the full electronic automation of bingo creates distortions in the way bingo is played. There is considerable significance to being the first player to “win” the bingo game by getting a “bingo” or the game-ending pattern. Many current, fully electronic games, however, often place minimum significance on this important characteristic of bingo and rather award the principal prizes to interim or consolation patterns and winners. There is less competition among players—a fundamental characteristic of bingo—for these interim prizes than there is for the game-ending prize. If multiple players hit the game-ending prize simultaneously, the common practice is to split the prize among them. By contrast, it is often the case that players who hit interim prizes are awarded the full prize, without regard to the number of other players who have also hit it.

## II. Background

The Indian Gaming Regulatory Act, 25 U.S.C. 2701–21 (“IGRA” or “Act”), 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 are the exclusive regulators of Class I gaming. 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, electronic or electromechanical facsimiles of any game of chance, and 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 regulations of Class III gaming. In addition, the United States Department of Justice possesses exclusive criminal and certain civil jurisdiction over Class III gaming on Indian lands.

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), “electronic computer or other technologic aid” (25 CFR 502.8), and “other game similar to bingo” (25 CFR 502.9). 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. However, the Commission did not define the many other terms used in conjunction with the various Class II games.

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.

Currently, the distinction between an electronic “aid” to a Class II game and an “electronic facsimile” of a game of chance, and therefore a Class III game, is often unclear. With advances in technology, the line between the two has blurred. When in IGRA, Congress defined “the game of chance commonly known as bingo,” 25 U.S.C. 2703(7)(A), it could not have foreseen the technological changes that would affect all games of chance. Likewise, by allowing electronic aids to the game of bingo, Congress could not have foreseen that some vendors and gaming operators would be unable or unwilling to distinguish between Class II games, which tribes regulate, and Class III facsimiles, which require compacts between tribes and states. The Commission is concerned that the industry is dangerously close to obscuring the line between Class II and Class III. It believes that the future success of Indian gaming under IGRA depends upon tribes, states, and manufacturers being able to recognize when games fall within the ambit of tribal-state compacts and when they do not.

Against this backdrop, the Commission has determined that it is in the best long term interest of Indian gaming to issue classification standards clarifying the distinction between “electronic, computer, and other technologic aids” used in the play of Class II games and other technologic devices that are “electronic or electromechanical facsimiles of a game of chance” or slot machines.

As the Commission worked through a process to develop these 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 further revisions to the definitions for the terms “electronic or electromechanical facsimile” in a separate rulemaking.

### III. Development

On May 25, 2006, the NIGC published two Notices of Proposed Rulemaking in the **Federal Register**. The goal of these proposed rules was to clearly distinguish technologically-aided Class II games from Class III “electronic or electromechanical facsimiles of any game of chance” or “slot machines of any kind.”

The first notice, 71 FR 30232, May 25, 2006, detailed a proposed change to the definition for “electronic or

electromechanical facsimile” that is contained in 25 CFR 502.8. The proposed change to the definition clarified that facsimiles of bingo are not permissible Class II games under the IGRA.

The second notice, 71 FR 30238, May 25, 2006, likewise further revised the definitions for “electronic or electromechanical facsimile” and “other games similar to bingo.” The proposed revision to the definition for “electronic or electromechanical facsimile” clarified that games under this section that comply with 25 CFR 546 would not be electronic or electromechanical facsimiles of any game of chance. The proposed revision to the definition for “other games similar to bingo” shifted the focus for the classification determination from whether the game is house-banked to whether the game had players competing against other players for the prizes. The proposed revision removed the requirement, not present in IGRA, that these games not be house-banked. The proposed revision also strengthened the requirement that the games involve players competing against other players for a common prize or prizes. Additionally, the proposed rule defined other terms used in Class II games that had not been previously defined. The proposed rule defined the following terms: Game, lotto, bonus prize, progressive prize, sleep, game of pull-tabs, electronic pull-tab, and instant bingo.

The second notice also added a new part to the Commission’s regulations (25 CFR 546) that explained the basis for determining whether a game of bingo or lotto, and “other game similar to bingo,” or a game of pull-tabs or “instant bingo,” meets the IGRA statutory requirements for Class II gaming, when these games are played electronically, primarily through an “electronic, computer or other technologic aid,” while distinguishing them from Class III “electronic or electromechanical facsimiles.”

### Consultation/Comments

The development of the proposed rule began formally with the March 31, 2004, appointment of an advisory committee comprised of tribal government representatives with substantial experience in gaming regulation and operations. A detailed history of the advisory committee’s work to that point is published in the preamble to the original proposed rule. 71 FR 30232, May 25, 2006. After publishing these notices the Commission embarked on an extensive consultation schedule, meeting with over 69 tribes in individual meetings. Additionally, the

Commission held a day-long hearing and heard testimony from tribes, manufacturers, test labs, and state regulators.

### IV. New Proposal

Despite the withdrawal of the regulations the Commission still believed that regulations distinguishing technologically-aided Class II games from Class III “electronic or electromechanical facsimiles of any game of chance” or “slot machines of any kind” were still needed. The Commission gave much thought to the direction it needed to take and is now proposing regulations that take into account many of the concerns voiced during the previous consultation and comment period.

### V. Changes from Original Proposal

The new proposed regulations differ in some significant ways from the original proposal. When these regulations were first proposed there was considerable criticism that the proposed rules would result in great economic hardship to tribes and manufacturers. The economic impact study commissioned by the NIGC supported this proposition. The Commission withdrew the proposed regulations and after careful examination decided to make several changes. These changes, described below, have the added benefit of reducing the economic impact of compliance with the regulations.

#### *Player Interaction/Speed of Game*

One of the defining characteristics of the game of bingo is that the winner is the first person to cover a previously designated arrangement of numbers or patterns. Implicit in this requirement is the notion that a player must make some overt action to win the game. It is for this reason that the Commission has required that players cover/daub after the numbers or patterns have been released. Originally, the Commission felt it was necessary to have at least two releases of numbers or patterns to ensure that there was truly a competition among the players to be the first to cover. Further, the Commission felt that the release of numbers should be over a period of two seconds to ensure that players were fully engaged in the game. The Commission has given this great thought and has tentatively concluded that this goal may be achieved by requiring only that players press a button to start the game and then press at least one more time to cover and claim their prize. Therefore, the new proposed regulations eliminate a

required daub as well as the required time period for the release of objects.

#### *Patterns*

As stated above, essential to the play of bingo is that individuals are competing against each other to be the first to obtain a previously designated arrangement of numbers or designations. The original proposal placed a restriction on the use of different patterns reasoning that players must be competing for the same winning pattern. The Commission extended this reasoning to include not only the game-winning prize but also any prizes offered. Upon further consideration the Commission felt it could be less restrictive by allowing bonus patterns to differ and still achieve the goal that players play against each other for the game-winning pattern. Therefore the use of different patterns for bonus prizes is now permitted under the proposed regulations.

#### *Appearance*

One of the primary goals of these classification standards is to enable tribes and regulators to distinguish Class II and Class III. The original proposal required that each machine display the message "This is a Game of Bingo" or "This is a Game of Pull-Tabs" in two inch letters. The Commission still believes that it is important to identify the game clearly but felt that a less intrusive method for doing so could accomplish this goal. The current proposed rule requires only that this message be prominently displayed giving manufacturers and tribal regulators more flexibility.

#### *Lab Certification*

For these regulations to be effective there must be a method for determining compliance with them before technologic aids are placed on the gaming floors. The easiest way to accomplish this goal is to have certified testing laboratories test the devices and certify that they comply with the criteria established by these standards. In the Commission's original proposal it was the responsibility of the NIGC to determine which labs were suitable to conduct this testing. However, after further consideration the Commission has determined that tribal gaming regulatory authorities are better suited to this task and in many instances are already certifying labs as being suitable to conduct testing. These regulations place the responsibility for approving gaming laboratories on the tribal gaming regulatory authority with certain minimum criteria for determining suitability.

#### *Grandfather Provision*

Absent from the original proposal were any provisions allowing for the continued use of games that were currently in operation. During consultations great concern was expressed that the immediate compliance with the proposed regulations would cause economic devastation to some tribes as well as to some manufacturers. The present proposal includes a grandfather provision that allows for the continued use of currently existing Class II games for a period of five years. Within a period of 120 days after this rule is final each tribal gaming regulatory authority will submit a list to the Commission of the Class II game interfaces currently in use. These are the only game interfaces that will qualify under the grandfather provision. This requirement effectively freezes the number of grandfathered interfaces in use. This provision also allows for software changes that ensure the proper functioning, security, or integrity of the game. It also allows for changes to the software that do not detract from compliance with this part such as changes to pay tables or to game themes. The inclusion of a grandfather provision greatly mitigates the economic impact of these regulations. However, the proposed regulations make clear that this grandfather provision will not provide a safe harbor to those machines which could be considered Class III under any standards.

To the extent that provisions are identical to the first proposed regulations, the Commission's thinking has not changed. Under the proposed rules, the following steps describe the play of bingo, lotto, or "other games similar to bingo" in an electronic medium as Class II gaming. First, there is a request for entry into the game. The game can proceed when there are six players or a minimum of two players after two seconds have elapsed. There is a release of a group of numbers, one at a time. Then there is a cover opportunity for all competing players.

Permissible Class II game play for bingo, lotto, or other games similar to bingo utilizing linked player stations as "electronic, computer or other technologic aids" will proceed as follows: To enter and begin the game, each player selects the cards to be used by that player and requests entry into the game by selecting an amount to wager and touching a button. After the game begins, numbers must be randomly drawn or electronically determined. Numbers must be released one at a time and used immediately in real time by the competing players in

the game. Selected numbers must be used in the sequence in which they are drawn in separate multiple rounds.

Players may cover each card they have in play by touching the video screen at the player station or a button showing the word "cover" or other similar designation. A minimum time of two seconds, or a lesser time if all players have covered, must be available for each player to accomplish the cover action. Players must be notified that they should cover their cards when the numbers are revealed. For each cover opportunity, the game must wait until at least one player covers. A player wins the game by being the first player(s) in the game to cover a pre-designated game-winning pattern and claiming the win by touching the screen or a button within the time allowed by the rules of the game, which must be at least two seconds.

A player who "sleeps" a potentially winning pattern forfeits the win based on that pattern. A player who fails to cover the numbers drawn within the time allowed may not later use those numbers in a prize-winning pattern other than the game-winning pattern. A bingo game cannot end until a player in the game wins the game-winning prize. The game may end at this point or other additional criteria for the end of the game may apply, such as the additional release(s) of numbers for a consolation prize(s).

Each player in a game must take overt action to cover the player's card(s) during play of the game by touching the screen or a designated button one time after each set of numbers is released. Each released number does not have to be covered individually by the player, *i.e.*, the player need not touch each specific space on the electronic bingo card where the called number or designation is located, but the player must overtly touch the screen or a designated button at least one time to cover the numbers.

The proposed regulations will also impact how these games are viewed by the player. First, the proposed rules require a notice to appear on the game cabinet informing the player that they are playing the game of bingo or a game similar to bingo. Second, a two inch by two inch card must be displayed at all times.

#### *Economic Impact*

It is likely that the proposed rule, considered separately and apart from the Commission's proposed 25 CFR part 547, "Technical Standards for Electronic, Computer, or Other Technologic Aids used in the Play of Class II Games," is a major rule under

5 U.S.C. 804.2, the Small Business Regulatory Enforcement Fairness Act. In any event, the NIGC has commissioned an economic impact study of the two proposals taken together. The study makes clear that the cost to the Indian gaming industry of complying with the two proposed rules will have an annual effect on the economy of \$100 million or more, at least for the first five years after adoption. Accordingly, the Commission treats the proposed rule as a major rule. The economic impact study is available for review at the Commission's Web site, <http://www.nigc.gov>, or by request using the addresses or telephone numbers above.

## 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.

### *Small Business Regulatory Enforcement Fairness Act*

It is likely that the proposed rule is a major rule under 5 U.S.C. 804.2, the Small Business Regulatory Enforcement Fairness Act. The NIGC has commissioned an economic impact study of this proposed rule as well as a proposed rule for Technical Standards taken together. The study makes clear that the cost to the Indian gaming industry of complying with the two proposed rules will have an annual effect on the economy of \$100 million or more, at least for the first 5 years after adoption. Accordingly, the Commission treats the proposed rule as a major rule.

### *Paperwork Reduction Act*

This proposed rule requires information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is subject to review by the Office of Management and Budget. The title, description, and respondent categories are discussed below, together with an estimate of the annual information collection burden.

With respect to the following collection of information, the Commission invites comments on: (1) Whether the proposed collection of information is necessary for proper performance of its functions, including whether the information would have practical utility; (2) the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the

methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques, when appropriate, and other forms of information technology.

*Title:* Process for Certification of games and "electronic, computer, and other technologic aids" as meeting the Classification Standards, proposed 25 CFR 546.11.

*Summary of information and description of need:* This provision in the proposed rule establishes a process for assuring that bingo, lotto, other games similar to bingo, pull tabs, and instant bingo, played through or using electronic aids, are in fact Class II before their placement on the casino floor in a Class II operation.

This process requires a tribe's gaming regulatory authority to require that all such games or aids, or modifications of such games or aids, be submitted to a qualified, independent testing laboratory for review and analysis. That submission includes a working prototype of the game or aid and pertinent software, all with functions and components completely documented and described. In turn, the laboratory will certify that the game or aids do or do not meet the requirements of the proposed rule, and any additional requirements adopted by the tribe's gaming regulatory authority, for a Class II game. The laboratory will provide a written certification and report of its analysis and conclusions, both to the tribal gaming regulatory authority for its approval or disapproval of the game or aid, and to the Commission for its review. In the circumstance that a laboratory has misinterpreted the applicable regulations, the NIGC Chairman may object to a certifying laboratory report and require its withdrawal. This action may be reviewed by the full Commission on appeal from a tribe or manufacturer submitting the game for its certification. A Commission decision upholding the Chairman's objection will constitute a "final agency action" that may be appealed to federal court.

This process is necessary because the distinction between an electronic "aid" to a Class II game and an "electronic facsimile" of a game of chance, and therefore a Class III game, is often unclear. With advances in technology, the line between the two has blurred. The Commission is concerned that the industry is dangerously close to obscuring the line between Class II and Class III and believes that the future

success of Indian gaming under IGRA depends upon tribes, states, and manufacturers being able to recognize which games fall within the realm of tribal-state compacts and which do not. The information collection requirements are an essential component of the process. Laboratories cannot conduct meaningful evaluation and analyses of games without documentation from the manufacturers. Tribes cannot make meaningful classification determinations without reports from the laboratories. The Commission cannot meaningfully review the process and, if necessary, object to a laboratory's findings, without reports.

*Respondents:* The respondents are developers and manufacturers of Class II games and independent testing laboratories. The Commission estimates that there are approximately 226 gaming tribes, 20 manufacturers and developers and five laboratories. The frequency of responses to the information collection requirement will vary.

Existing Class II games do not have to comply with this regulation for five years. After five years all existing games or aids in Class II operations that have not been classified and come within this rule must be submitted and reviewed if they are to continue in Class II operations. The useful life of such machines generally ranges between two to five years. Therefore, due to the five year grandfather provision, the Commission expects the implementation of these regulations to occur only as new Class II machines are developed and older machines replaced. The Commission expects that very few of the existing machines will be submitted to laboratories under these regulations. Consequently, the frequency of responses will be a function of the Class II market and the need or desire for new games or aids.

All new Class II machines and platforms must go through this classification process. The Commission estimates a 20% turnover in machine games in most operations and that there are approximately 25 Class II gaming systems presently in use. Consequently, there should be one to five new submissions each year with three to ten modifications. The Commission also estimates that the frequency of responses will be infrequent and occasional submissions during periods when there are a few games, aids, or modifications brought to market, punctuated by fairly steady periods of submissions when new games and aids are introduced. In any event, the Commission estimates that submissions will number approximately four to 15 in total.

Modifications will not require the same level of employee hours to submit and review. The amount of documentation or size of a laboratory certification and report is a function of the complexity of the game, equipment, or software submitted for review. Minor modifications of software or hardware that a manufacturer has already submitted and that a laboratory has previously examined are a matter of little time both for manufacturer and laboratory, while the submission and review of an entirely new game platform can be more time consuming. Unless a tribe imposes additional standards, we expect that tribes will rely on classifications performed or requested by other tribes. This latter fact is borne out by tribes' present reliance on NIGC classification opinions.

**Information Collection Burden:** The preparation and submission of documentation supporting submissions by developers and manufacturers (as opposed to the game or aid hardware and software per se) is an information collection burden under the Paperwork Reduction Act, as is the preparation of certifications and reports of analyses by the test laboratories. The amount of documentation or size of a laboratory certification and report is a function of the complexity of the game, equipment, or software submitted for review. Minor modifications of software or hardware that a manufacturer has already submitted and that a laboratory has previously examined are a matter of little time both for manufacturer and laboratory, while the submission and review of an entirely new game platform can be quite time consuming.

The practice of submission and review set out in the proposed rule, however, is not new. It is already part of the regulatory requirements in tribal, state, and provincial gaming jurisdictions throughout North America and the world. Manufacturers already have significant compliance personnel and infrastructure in place, and the very existence of private, independent laboratories is due to these requirements.

Accordingly, the Commission estimates that gathering and preparing documentation for a single submission requires, on average, eight hours of an employee's time for a requesting party and that following examination and analysis, writing a report and certification requires, on average, 10 hours of an employee's time for a laboratory. Modifications will take approximately half that time. Based on one to five new submissions each year and three to 10 modifications, the Commission estimates that the

information collection requirements in the proposed rule will be a 20 to 80 hour burden on requesting parties. The Commission estimates that the information collection requirements in the proposed rule will be a 50 to 100 hour burden on laboratories.

We estimate that the cost to requesting parties is approximately \$50 per hour and to laboratories \$100 per hour. Based on these estimates requesting parties would pay in total an estimated \$1000 to \$4000. The total estimate for laboratory costs would range from \$5000 to \$10,000 per year.

**Comments:** Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3507(d), the Commission has submitted a copy of this proposed rule to OMB for its review and approval of this information collection. Interested persons are requested to send comments regarding the burden, estimates, or any other aspect of the information collection, including suggestions for reducing the burden (1) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for National Indian Gaming Commission, 725 17th St., NW., Washington DC, 20503, and (2) to Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission, 1441 L. Street, NW., Washington DC 20005. Comments must be provided by November 23, 2007.

#### *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).

#### *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 Order.

#### **List of Subjects in 25 CFR Parts 502 and 546**

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 502 and add a new Part 546 as follows:

#### **PART 502—DEFINITIONS OF THIS CHAPTER**

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

**Authority:** 25 U.S.C. 2701 *et seq.*

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.

3. Add a new part 546 to read as follows:

#### **PART 546—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**

Sec.

- 546.1 What is the purpose of this part?
- 546.2 What is the scope of this part?
- 546.3 What are the definitions for this part?
- 546.4 What are the criteria for meeting the first statutory requirement that the game of bingo, lotto, or other games similar to bingo be played for prizes, including monetary prizes, with cards bearing numbers or other designations?
- 546.5 What are the criteria for meeting the second statutory requirement that bingo, lotto, or other games similar to bingo be games in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?
- 546.6 What are the criteria for meeting the third statutory requirement that bingo, lotto, or other games similar to bingo be won by the first person covering a previously designated arrangement of numbers or designations on such cards?
- 546.7 What are the criteria for meeting the statutory requirement that Class II pull-tabs or instant bingo not be electronic or electromechanical facsimiles?
- 546.8 What is the process for approval, introduction, and verification of electronic, computer, or other technologic aids under the classification standards established by this part?
- 546.9 What are the steps for a compliance program administered by a tribal gaming regulatory authority to ensure that electronic, computer, or other technologic aids in play in tribal gaming facilities meet the Class II certification requirements?
- 546.10 When must a tribe comply with this part?



546.11 What is the effect on this part if a section is declared invalid?

**Authority:** 25 U.S.C. 2701 *et seq.*

#### **§ 546.1 What is the purpose of this part?**

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, another game 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. These standards for classification are intended to ensure that Class II gaming using electronic, computer, or other technologic aids can be distinguished from Class III electronic or electromechanical facsimiles. If the technologic aid meets the requirements of this part, then the fundamental characteristics of the game have not been incorporated and the aid is not an electronic or electromechanical facsimile.

#### **§ 546.2 What is the scope of this part?**

This part is intended to address only games played solely with electronic, computer, or other technologic aids as defined in part 502.7 of this chapter.

#### **§ 546.3 What are the definitions for this part?**

(a) What is a game of bingo or other game similar to bingo? A game of the game of chance commonly known as bingo or another game similar to bingo consists of the random draw or electronic determination and release or announcement of numbers or other designations necessary to form the pre-designated game-winning pattern on a card held by the winning player and the participation of competing players to cover (daub) the numbers or other designations which appear on their card(s) when the selected numbers or other designations are released for play. A game ends when a participating player(s) claims the win after obtaining and covering (daubing) the pre-designated game-winning pattern and consolation prizes, if any, are awarded in the game.

(b) What is lotto? The term lotto means a game of chance played in the same manner as the game of chance commonly known as bingo.

(c) What is a bonus prize in the game commonly known as bingo or other

game similar to bingo? A bonus prize is a prize awarded in a game in addition to the game-winning prize. The prize may be based on different pre-designated and pre-announced patterns from the game-winning pattern, may be based on achieving a winning pattern in a specified quantity of numbers or designations drawn or electronically determined and released, or a combination of these conditions. A bonus prize may be awarded as an interim prize while players are competing for the game-winning prize or as a consolation prize after a player has won the game-winning prize.

(d) What is a progressive prize in the game commonly known as bingo? A progressive prize is an established prize for a game, funded by a percentage of each player's purchase or wager, that is awarded to a player for obtaining a specified pre-designated and pre-announced pattern within a specified quantity of numbers or designations randomly drawn and released or electronically determined, or randomly drawn and released or electronically determined in a specified sequence. If the progressive prize is not won in a particular game, the prize must be rolled over to each subsequent game until it is won. The progressive prize is thus increased from one game to the next based on player buy-in or wager contributions from each qualifying game played in which the prize is not won. All contributions to the progressive prize must be awarded to the players. A winning pattern for a progressive prize is not necessarily the same as the game-winning prize pattern.

(e) What does it mean to sleep in the game of bingo or another game similar to bingo? To sleep or to sleep a bingo means that a player fails, within the time allowed by the game:

(1) To cover (daub) the previously released numbers or other designations on that player's card(s) constituting a game-winning pattern or other pre-designated winning pattern; and

(2) To claim any prize to which the player is entitled, having covered (daubed) a previously designated winning pattern, thereby resulting in the forfeiture of the prize to which the player would otherwise be entitled.

(f) What is the game of pull-tabs? In the game of pull-tabs, players purchase cards from a set of cards known as the deal. Each deal contains a finite number of pull-tab cards that includes a pre-determined number of winning cards. Each individual pull-tab within a deal is a paper or other tangible card with hidden or covered symbols. When those symbols are revealed, there is an arrangement of numbers or symbols

indicating whether the player has won a prize. Winning cards with pre-established prizes are randomly spaced within the pre-arranged deal. One deal consists of all of the pull-tabs in a given game that could be purchased.

(g) What is an electronic pull-tab? An electronic pull-tab is an electronic facsimile of a pull-tab that is displayed on a video screen.

(h) What is instant bingo? In instant bingo, a player purchases a card containing a pre-selected group of numbers or designations; the winning cards are those in which the pre-selected group of numbers or designations on the card matches the preprinted winning arrangement indicated elsewhere on the card. The game is functionally the same as pull-tabs.

#### **§ 546.4 What are the criteria for meeting the first statutory requirement that the game of bingo, lotto, or other games similar to bingo be played for prizes, including monetary prizes, with cards bearing numbers or other designations?**

(a) Each player in the game must play with one or more cards. Each player in the game must obtain the card or cards to be used by that player in the game before numbers or other designations for the game are randomly drawn or electronically determined. Players cannot change cards once play of a particular bingo game has commenced. Electronic cards are permissible.

(b) Electronic cards in use by a player must be displayed prominently and must be clearly visible to that player during game play. If multiple electronic cards are used by a player, the game must offer the player the capability of seeing each one of his or her cards. At the conclusion of the game, each player must see his or her card with the highest value prize or, if no prize was won, the card closest to a bingo win. At no time shall an electronic card measure less than two inches by two inches or four square inches if other than a square card is used.

(c) For a game of bingo, each card must contain a five by five grid of spaces. Each space will contain a unique number or other designation which may not appear twice on the same card. The card may contain one free space without a specified number or other designation, provided the free space is in the same location on every card in play or available to be played in the game.

(d) Each game shall prominently display the following message: “THIS IS A GAME OF BINGO” or “THIS IS A GAME SIMILAR TO BINGO.”

(e) As a variant of bingo, in another game similar to bingo, each card must



contain at least three equally sized spaces. Each space will contain a unique number or other designation which may not appear twice on the same card. One space may be designated a free space provided the card has at least three other spaces.

(f) When a number or other designation is covered, the covering must be indicated on the card by a change in the color of the space, a strike-out through the space, or some other readily apparent visual means.

(g) All prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game. Random or unpredictable prizes are not permitted.

(h) Each game must have a winning player and a game-winning prize must be awarded in every game. The pattern designated as the game-winning pattern does not need to pay the highest prize available in the game. A game-winning prize may be less than the amount wagered, provided that the prize is no less than one cent.

(i) 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.

(j) The designated winning patterns and the prizes available must be explained in the rules of the game, which must be made available to the players upon request.

(k) A bonus prize in a game that is designated as an interim prize must be awarded in a random draw or electronic determination and release of numbers or other designations that is no more than the exact quantity of numbers or designations that are needed for the game-winning player to achieve the game-winning pattern.

(l) A bonus prize in a game that is designated as a consolation prize may be awarded after the game-winning pattern is achieved and claimed by a player but only after a subsequent release of randomly drawn or electronically determined numbers or other designations has been made.

(m) A progressive prize may be awarded only if the game also provides a game-winning prize as described elsewhere in this part.

(n) All prizes in a game, including progressive prizes, must be awarded based on the outcome of the game of bingo and may not be based on events outside the selection and covering of numbers or other designations used to determine the winner in the game and

the action of the competing players to cover the pre-designated winning patterns. The prize structure must not rely on an additional element of chance other than the play of bingo.

(o) Bingo and other games similar to bingo may offer an alternative display of the results of the game in addition to the display of the game results on the electronic bingo card, provided that the player has the option to disable the alternative display and play using only the electronic card display. An alternative display may include game theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels.

**§ 546.5 What are the criteria for meeting the second statutory requirement that bingo, lotto, or other games similar to bingo be one in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?**

(a) In a game of bingo, the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool containing 75 such numbers or other designations and used in the sequence in which they are drawn. Each game will permit the random draw and release or electronic determination of all numbers or designations in the pool. A common draw or electronic determination of numbers or designations may be utilized for separate games that are played simultaneously.

(b) As a variant of bingo, in another 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 greater in number than the number of spaces on the card used in the game.

(c) All numbers or other designations used in the game must be randomly drawn or electronically determined after the cards to be used in the game have been assigned to or selected by the players in the game. The cards cannot have pre-covered numbers or other designations.

(d) The numbers or other designations randomly drawn or electronically determined must be used in real time and not stored for later use. The numbers or other designations must be used in the sequence in which they are drawn.

(e) To cover (daub), a player in a game must take overt action after numbers or designations are released by touching the screen or a designated button. A player must cover (daub) at least one

time after a set of numbers or other designations are released. The overt action of covering (daubing) may be done simultaneously with claiming.

(f) Each released number or designation does not have to be covered (daubed) individually by the player, i.e., the player need not touch each specific space on the electronic bingo card where the called number or designation is located. However, the player must have the opportunity to cover (daub) by touching the screen or a designated button at least one time when those numbers or other designations are released, if those numbers or other designations appear on the player's card. Following this action by a player, the video screen at that player interface will display a different color on the number or designation on that player's card, a strike-out through the space, or some other readily apparent visible characteristic if that number or designation has been properly covered (daubed) by the player. Players must be notified that they should cover (daub) their cards and claim their prize when the numbers or designations are revealed.

(g) Games may not include a feature whereby covering (daubing) after a release occurs automatically or without overt action taken by the player following the release.

(h) All players in a game, and not just a winning player, must be required by the rules of the game to cover (daub) the selected numbers or other designations that appear on their card when those numbers or other designations are released as an indication of their participation in a common game.

(i) Players must cover (daub) after numbers or designations are released in order to achieve any winning pattern. In the event of multiple releases of numbers, a player may later cover (daub) numbers or designations slept following a previous release (catch up) for use in obtaining the game-winning pattern. Failure to cover (daub) after each release results in the player forfeiting use of those numbers or other designations in any other pattern in the game. For bonus prizes and progressive prizes, if a player fails to cover (daub) one or more numbers or other designations, that player cannot be awarded such prize based on a winning pattern which contains one or more of the numbers or other designations not covered (daubed) by the player. For game-winning prizes, if a player fails to cover the player may later cover (daub) the number(s) or other designations and win such prize if that player is the first player to cover all other numbers or

designations making up the game-winning pattern and claim the prize.

(j) If a player sleeps the game-winning pattern, the game must continue until a player subsequently obtains and covers (daubs) and claims the game-winning pattern.

(k) All numbers or other designations not covered (daubed) 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 or a pattern yielding bonus or progressive prizes must be notified by visible message on the video screen that the pattern was slept.

(l) After all available numbers or designations that could lead to a game-winning prize have been randomly drawn or electronically determined and released (i.e. no more objects could be drawn that would assist in the formation of a game-winning prize), the game may allow an unlimited length of time to complete the last required cover (daub) and claim of the prize, or it may be declared void and wagers returned to players and prizes canceled.

(m) The gaming operation or its employees may not play as a substitute for a player.

**§ 546.6 What are the criteria for meeting the third statutory requirement that bingo, lotto, or other games similar to bingo be won by the first person covering a previously designated arrangement of numbers or designations on such cards?**

(a) Because the game must be won by the first person, each game must be played by multiple players. Players in an electronic game must be linked through a networked system. The system must require a minimum of two players for each game, but not limit participation to two players, and must be designed to broaden participation in each common game by providing reasonable and sufficient opportunity for at least six players to enter the game. Games cannot begin until two seconds have elapsed from the time that the first player elects to play, unless six players enter. Nothing in this section is intended to limit games to six players.

(b) To establish the game as a contest in which players play against one another, the game must provide for one or more releases of selected numbers or other designations. Each release will provide one or more numbers or other designations randomly selected or electronically determined. The game may end after the first release or after subsequent releases, when the game-winning pattern is covered (daubed) and claimed. After the game-winning pattern

is covered and claimed, there may be additional releases of randomly drawn or electronically determined numbers or other designations for a consolation prize(s).

(c) Each game must have one game-winning pattern or arrangement, which must be common to all players and may be won by multiple players simultaneously. Each game-winning pattern or arrangement must consist of at least three spaces, not counting any free spaces used. The game-winning pattern or arrangement must be available to players before the game begins.

(d) Other patterns or arrangements consisting of at least two spaces each, not counting free spaces, may be used for the award of bonus or progressive prizes, if the patterns or arrangements are designated and made available to players before the game begins.

(e) Events outside the play of bingo may not be used to determine the eligibility for a prize award or the value of a prize.

(f) The set of selected numbers or other designations in the first release may contain all of the numbers or other designations necessary to form the game-winning pattern on a card in play in the game. The set may contain the numbers or other designations necessary to form other winning patterns for bonus or progressive prizes. The quantity of numbers or designations in the second or subsequent releases may not extend beyond the quantity of numbers or other designations necessary to form the first available eligible game-winning pattern on a card in play in the game. There may be additional releases to allow for additional bonus prizes.

(g) Prizes can be claimed simultaneously when a player covers (daubs) to end the game.

(h) Bonus or progressive prizes may be awarded based on pre-designated patterns provided that the award of these prizes is based on the play of bingo in the same manner as for the game-winning prize. Bonus or progressive prizes may be based on different pre-designated and pre-announced patterns, on achieving a winning pattern in a specified quantity of numbers or other designations drawn or electronically determined and released, on the order in which numbers or other designations are drawn or electronically determined and released, or on a combination of these criteria. Bonus or progressive prizes may be awarded as interim prizes, before or as the game-winning prize is awarded, or as consolation prizes after the game-winning prize is awarded.

(i) In order for players to participate in a common game, the probability of achieving the game-winning prize pattern or progressive prize pattern, if any, may not vary.

(j) Prizes in a common game may be increased, or progressive prizes offered, based upon different entry wagers.

(k) The use of a pay table is permitted. The order of, or quantity of, numbers or other designations randomly drawn or electronically determined may affect the prize awarded for completing any pre-designated winning pattern in a game. A multiplier to the prize based on a winning pattern containing a specified number or other designation is permitted.

(l) A game-winning prize must be awarded in every game. If the first player or a subsequent player obtaining the pre-designated game-winning prize pattern sleeps that pattern, the game must continue until a player achieves the game-winning pattern. The same value prize must be awarded to a subsequent game-winning player in the game.

(m) Alternative result display options may only be utilized for entertainment or amusement purposes and may not be used independently to determine a winner of the game or the prizes awarded or change the results of the bingo game in any way.

(n) An ante-up format, in which a player is required to wager before each release as a condition of remaining in the game, is permissible, provided the game maintains at least two participating players. If only one player remains after one or more releases, that player will be declared the winner of the game-winning prize, and the game will end, provided that player obtains, covers (daubs), and claims the game-winning pattern. If all players leave the game before a game-winning pattern is obtained, covered (daubed), and claimed by a player, the game will be declared void and wagers returned to players.

**§ 546.7 What are the criteria for meeting the statutory requirement that pull-tabs or instant bingo not be an electronic or electromechanical facsimile?**

(a) 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.

(b) A pull-tab card may contain more than one arrangement of numbers or symbols, but each arrangement must comport with the requirements of this section. The player must pay for all of the arrangements on that pull-tab card in advance of dispensing it.

(c) Pull-tabs that exist in a tangible medium may also be sold to players with assistance of a technologic aid that assists in the sale. The technologic aid may also read and display the contents of the pull-tab as it 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 assisting in the sale of the pull-tab.

(d) The player may also purchase a pull-tab from a person or from a vending unit and place the pull-tab in a separate technologic aid that reads and displays the contents of the pull-tab.

(e) If pull-tabs contain multiple arrangements of numbers or symbols, the rules for game play must indicate the disposition of a pull-tab in a technologic aid that is only partially played, i.e. all arrangements have not been viewed in the technologic aid.

(f) A technologic aid may also show pull-tab results on a video screen using alternative displays, including game-theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels. Options for players found in this alternative display may not determine a winner of the game or the prizes awarded or change the results of the pull-tab game in any way.

(g) If the pull-tab is a winning card, it must be redeemable for a prize when presented at the location in the gaming facility designated by the gaming operator.

(h) A pull-tab may not be generated or printed at the player station.

(i) For technologic aids that are larger than the pull-tab, the machine shall prominently display the following message: "THIS IS THE GAME OF PULL-TABS."

(j) The results on the pull-tab shall be no smaller than an eight point font.

(k) A pull-tab game is 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.

(l) 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.

**§ 546.8 What is the process for approval, introduction, and verification of electronic, computer, or other technologic aids under the classification standards established by this part?**

(a) An Indian tribe or a supplier, manufacturer, or game developer sponsored by a tribe (hereafter, the "requesting party") wishing to have games and associated electronic, computer, or other technologic aids certified as meeting the classification standards established by this part must submit the games and equipment to a testing laboratory recognized by the tribal gaming regulatory authority under this part. The requesting party must support the submission with materials and software sufficient to establish that the game and equipment meets classification standards, any other applicable regulations of the Commission, and provide any other information requested by the testing laboratory.

(b) For an electronic, computer, or other technologic aid to be certified as meeting the classification standards under this part, the tribe shall require the following:

(1) The testing laboratory will evaluate and test the submission to the standards established by this part and any other applicable regulations of the Commission. 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.

(2) At the completion of the evaluation and testing process, the testing laboratory will provide a formal written report to the requesting party setting forth its findings and conclusions. The testing laboratory will also forward a copy of its report to the Commission. The report may be made available upon request to any interested tribal gaming regulatory authority by the requesting party or by the testing laboratory. Each testing laboratory will maintain a detailed listing of the electronic, computer or other technologic aids it certifies.

(3) Each report from a testing laboratory must state the name of the requesting party; the type of game evaluated; name(s) and version(s) of the game played with the electronic, computer, or other technologic aid being

evaluated; all associated game themes under which the game will be played on the technologic aid being evaluated; findings regarding game features and manner of play; a checklist of the standards established by this part and any other applicable regulations of the Commission together with an indication of the results of testing and evaluation to each particular standard; and, a summary conclusion as to whether the gaming conducted with the aid meets the requirements of this part and any other applicable regulations of the Commission. A supplemental report addressing additional game themes or other non-play features may follow as necessary, and will contain a statement verifying that gaming conducted with the aid continues to meet the requirements of this part and any other applicable regulations of the Commission.

(4) Each report will also include one or more unique signatures or checksum values for the operating programs used with the electronic, computer, or other technologic aid.

(5) In certifying a game or an electronic, computer, or other technologic aid for Class II play, a requesting party or a tribe may not rely on a report from a testing laboratory owned or operated by that requesting party or that tribe.

(c) 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 and any other applicable regulations of the Commission. The Commission will make its listing available to the public. The Commission will only make available for public review records or portions of records subject to release under the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; or the Indian Gaming Regulatory Act, 25 U.S.C. 2716(a).

(d) Additional requirements established by a tribal gaming regulatory authority.

(1) A tribal gaming regulatory authority may establish additional classification standards that extend and exceed the standards established by this part and any other applicable regulations of the Commission. It may require additional testing and certification to its own extended standards as a condition to operation of the game and associated electronic, computer, or other technologic aid in a gaming facility it regulates.

(2) A tribal gaming regulatory authority may elect to provide its

extended testing standards to the testing laboratories and require additional tests and certification reports applicable to its own certification of a game or electronic, computer or other technologic aid. A requesting party wishing to meet the specific tribal requirements will submit additional supporting materials and documentation to the testing laboratory as may be necessary to meet the specific tribal requirements. A testing laboratory evaluating a game and associated equipment will include in its report to the requesting party information relevant to the specific additional tribal requirements and provide a copy of the report to that tribal gaming regulatory authority and the Commission.

(e) Objections to a testing laboratory certification.

(1) (i) Within 30 days of receipt of the certification, a tribe may object to the certification by submitting a notice of objection to the Chairman. The objection shall specify the reasons why the certification is erroneous and shall include supporting documentation, if any. If a tribe timely objects, the Chairman or his or her designee shall have 60 days from receipt of the objection to concur with the tribe's objection. The Chairman or his or her designee will notify the testing laboratory, the requesting party and the sponsoring tribe of his concurrence or objection.

(ii) If no objection is submitted by a tribe, the Chairman or his or her designee will review the certifications and accompanying reports received from testing laboratories and may object 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.

(iii) If the Chairman receives no objection and does not object on his or her own, the requesting party or sponsoring tribe may assume the Chairman does not object to the certification. The Chairman may object to a testing laboratory certification subsequent to the 60-day period upon good cause shown. If the Chairman finds good cause to object to the certification subsequent to the 60-day period, he or she shall do so only after providing notice to the testing laboratory, the requesting party, and the sponsoring tribe and an opportunity for a hearing.

(2) The Chairman or his or her designee will conduct additional discussions with the testing laboratory, the requesting party, and the sponsoring tribe on any game or electronic, computer, or other technologic aid to

which the Chairman has objection and attempt to resolve the dispute within 30 days after receiving notice of the Chairman's objection. The Chairman and the requesting party and sponsoring tribe may agree to the appointment of a mediator or other third party to review the laboratory's certification and the Chairman's objection and provide a recommendation on the matter within this 30-day period. Following the discussions and receipt of the recommendation of the mediator or other third party, if any, the Chairman will decide the issue and inform the testing laboratory, the requesting party, and the sponsoring tribe of his or her determination.

(3) Within 30 days after receiving notice of the Chairman's determination, the requesting party or the sponsoring tribe may appeal the Chairman's determination to the full Commission by providing written notice of appeal along with documents and other information in support of the appeal. The appeal will be decided by the Commission based on the record developed by the Chairman or his or her designee and on written submissions by the testing laboratory, the requesting party, and the sponsoring tribe, unless the Commission requests additional information. The appeal will not include a hearing under Part 577 of this chapter unless directed by the Commission.

(4) If the requesting party or the sponsoring tribe does not appeal the Chairman's determination, or if the objection is upheld after review by the Commission following an appeal, the testing laboratory and the requesting party will notify any tribal gaming regulatory authority to which it has provided a certification and report on the game and associated equipment that the Chairman has objected to the certification and that the certification is no longer valid.

(5) An objection by the Chairman or his or her designee, upheld after review by the Commission, will be a final agency action for purposes of suit by the requesting party under the Administrative Procedures Act.

(f) Recognition of Testing Laboratories. (1) A testing laboratory may provide the examination, testing, evaluating and reporting functions required by this section provided that:

(i) The testing laboratory demonstrates its integrity, independence and financial stability to the tribal gaming regulatory authority;

(ii) The testing laboratory demonstrates its relevant technical skill and capability to the tribal gaming regulatory authority;

(iii) The testing laboratory is not owned or operated by the tribe or tribal gaming regulatory authority; and

(iv) The tribal gaming regulatory authority:

(A) Makes a suitability determination of the testing laboratory based on requirements no less stringent than required by § 533.6(b)(1)(ii)–(v) and § 533.6(c) of this chapter and based upon no less information than that required by § 537.1 of this chapter, or

(B) Accepts, in its discretion, a determination of suitability for the testing laboratory made by any other gaming regulatory jurisdiction in the United States.

(v) After reviewing the information provided by the testing laboratory, the tribal gaming regulatory authority may, in its discretion, determine that the testing laboratory is qualified to perform testing and evaluation for games played using electronic, computer, or other technologic aids that are offered for use in Class II gaming.

(2) The tribal gaming regulatory authority shall:

(i) Maintain a record of all determinations made pursuant to paragraphs (f)(1)(iv) and (f)(1)(v) of this section for a minimum of three years and shall make the records available to the Commission upon request. The Commission will only make available for public review records or portions of records subject to release under the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; or the Indian Gaming Regulatory Act, 25 U.S.C. 2716(a).

(ii) Place the testing laboratory under a continuing obligation to notify it of any adverse regulatory action in any jurisdiction where the testing laboratory conducts business.

(ii) Require the testing laboratory to provide notice of any material changes to the information provided to the tribal gaming regulatory authority.

**§ 546.9 What are the steps for a compliance program administered by a tribal gaming regulatory authority to ensure that electronic, computer, or other technologic aids in play in tribal gaming facilities meet Class II certification requirements?**

(a) In regulating Class II gaming, a tribal gaming regulatory authority will institute a compliance program that ensures bingo, lotto, and other games similar to bingo and pull-tabs and instant bingo in use in its gaming facilities, which are operated and played with electronic, computer, or other technologic aids required to be certified by this part, meet the requirements of this part, any other

applicable regulations of the Commission, and any additional tribal standards adopted by the tribal gaming regulatory authority. The program must include the following elements:

(1) Determination by the tribal gaming regulatory authority that electronic, computer, or other technologic aids, along with the games played thereon, required to be certified as meeting the standards established by this part, have been tested and certified by a laboratory recognized under § 546.8(f) of this part as meeting all applicable Class II standards before the equipment is placed for use in the gaming operation.

(2) Internal controls that prevent unauthorized access to game control software to preclude modifications that would cause the electronic, computer, or other technologic aid and the games played therewith to potentially fail to meet the required standards.

(3) Periodic testing of all of the servers and a random sample of the electronic components and software to validate that the equipment and software continue to meet the required standards and are identical to that tested and certified by the testing laboratories.

(b) In authorizing particular Class II gaming within a gaming facility it licenses, a tribal gaming regulatory authority shall, at a minimum, require a finding and certification by an independent gaming testing laboratory, recognized by the tribal gaming regulatory authority under this part, that each electronic, computer, or other technologic aid used in connection with such gaming meets the standards of this part. If the tribe's gaming regulatory authority has established classification standards that apply additional criteria, the tribe shall require additional findings consistent with the additional standards as a condition to authorizing a technologic aid for use and play in the gaming facilities it regulates.

(c) The tribal gaming regulatory authority shall maintain a current listing of each electronic, computer, or other technologic aid including servers, player interfaces, and each game program it has authorized for play under the classification standards governed by this part, indicating that all such games meet the classification standards established by this part and any additional standards established by the tribe. The listing will show the asset identification number(s) of each electronic, computer, or other technologic aid including servers and player interfaces and the manufacturer's name; version number(s), game theme titles and other unique identifier(s), of the game operating software, for the games authorized for play as

documented in a certification report(s) issued by a testing laboratory.

**§ 546.10 When must a tribe comply with this part?**

(a) Tribes must comply with this part when placing Class II electronic, computer, or other technologic aids governed by this part in operation after [Insert 120 days after effective date].

(b) Tribes using Class II technologic aids governed by this part on or before [Insert 120 days from the effective date], may continue to operate those electronic, computer or other technologic aids for a period of five years from the same date. During this period technologic aids may be sold, leased, or otherwise transferred to another tribe.

(c) Individual hardware components of technologic aids governed by this part and in use on or before [Insert 120 days from effective date] may be repaired or replaced to ensure the proper functioning, security, or integrity of the game. All new software versions must be certified under this part except for changes made to ensure the proper functioning, security, or integrity of the game and changes that will not detract from the games overall compliance with the requirements of this part.

(d) On or before [Insert 120 days from the effective date], each tribal gaming regulatory authority shall submit to the Commission the list required by § 546.9(c) of this part.

(e) Nothing in this section is intended to authorize the continued operation of uncompacted Class III machines that allow a player to play against the machine.

**§ 546.11 What is the effect on this part if a section is declared invalid?**

If any provision of this part be declared invalid by a court of competent jurisdiction, such decision shall not affect the remainder of this part.

Dated: October 17, 2007.

**Philip N. Hogen,**  
*Chairman.*

**Cloyce V. Choney,**  
*Commissioner.*

**Norman H. DesRosiers,**  
*Commissioner.*

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**DEPARTMENT OF THE INTERIOR**

**National Indian Gaming Commission**

**25 CFR Parts 542 and 543**

**RIN 3141-AA37**

**Minimum Internal Control Standards for Class II Gaming**

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

**ACTION:** Proposed rule.

**SUMMARY:** In response to the inherent risks and the need for effective controls in tribal gaming, the Commission, in January 1999, developed minimum internal control standards (MICS). Since their original implementation, it has become obvious that the MICS require technical adjustments and revisions so that they continue to be effective in protecting tribal assets, while still allowing tribes to utilize technological advances in the gaming industry. The current MICS are specific to the conduct of a wagering game without regards to whether the game is classified as a Class II or Class III game. This proposed rule is intended to supersede certain specified sections of the current MICS and replace them with a new part titled Minimum Internal Control Standards for Class II Gaming.

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

**ADDRESSES:** Mail Comments to "Comments on Class II MICS" National Indian Gaming Commission, Suite 9100, 1441 L Street, NW., Washington, DC 20005. Comments may be transmitted by facsimile to 202-632-7066, or mailed or submitted to the above address. Comments may also be submitted electronically to [bingo\\_mics@nigc.gov](mailto:bingo_mics@nigc.gov).

**FOR FURTHER INFORMATION CONTACT:** Joe H. Smith, Director of Audits, telephone 202-632-7003. This is not a toll free call.

**SUPPLEMENTARY INFORMATION:**

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