



August 26, 2013

Via email to: reg.review@nigc.gov

Attention:
National Indian Gaming Commission
1441 L Street NW., Suite 9100
Washington, DC 20005

**RE: COMMENTS ON BEHALF OF WMS GAMING INC. TO NIGC'S
PROPOSED REINTERPRETATION OF ONE TOUCH BINGO**

The following comments are submitted on behalf of WMS Gaming Inc. ("WMS"). These comments are in response to the National Indian Gaming Commission's ("NIGC") Request for Public Comment dated Tuesday, June 25, 2013, regarding the NIGC's proposed reinterpretation of its earlier decision regarding the classification of server based electronic bingo system games that can be played utilizing only one touch of a button ("one touch bingo"). The NIGC's proposed reinterpretation is in response to questions the NIGC has received from the regulated community and the public about whether one touch bingo is a Class II or a Class III game under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA").

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**I. BACKGROUND OF WMS AND INTEREST IN SUBMITTING
COMMENTS**

WMS is an electronic gaming and amusement company based in Waukegan, Illinois. WMS' business includes the manufacture of electronic gaming devices, systems and components that are used by the tribal gaming industry.

WMS supports the NIGC's effort to resolve the uncertainty surrounding one touch bingo games and the NIGC's proposed reinterpretation that one touch bingo is properly classified as a Class II game under the IGRA.

**II. ONE TOUCH BINGO IS PROPERLY CLASSIFIED AS CLASS II GAME
UNDER THE IGRA**

The IGRA defines Class II gaming as containing three fundamental elements. First, the game must be played for prizes, with cards bearing numbers or other designations. Second, the holder of the card must cover such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. Third, the game must be won by the first person covering a previously designated arrangement of numbers or designations on such cards. *See* 25 U.S.C. § 2703(7)(A)(i)(I) – (III).



WMS agrees with the NIGC's proposed reinterpretation that one touch bingo satisfies the IGRA's statutory requirements for a game of bingo. First, one touch bingo is played for prizes, usually money, on a card bearing numbers or symbols. One touch bingo also satisfies the second requirement because the player covers the numbers or designations when drawn via the player's first touch of a button and through the assistance of a machine. Finally, one touch bingo satisfies the third requirement because the machine assists the player (again through the first touch of a button) in being the first person to cover the designated arrangement, and the bingo game is won by the first person to cover the pre-designated pattern.

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 other Class II games. In the IGRA, Congress recognized the right of tribes to use "electronic, computer or other technologic aids" in connection with Class II gaming. Under a plain language definition of these terms, the distinction between an electronic "aid" to a Class II game and a Class III "electromechanical facsimile" of a game of chance is relatively ascertainable. One touch bingo is properly classified as an electronic aid because it, in part, assists a player in playing a game, broadens participation levels in a common game, and allows a player to play a game against other players than against a machine.

WMS, like many in the regulated community, have disagreed with prior attempts by the NIGC to create a regulatory "bright line" between Class II and Class III games that is outside the bounds of the IGRA. This is because Congress already created a "bright line" between Class II and Class III games in its complete and explicit statutory definition of bingo in the IGRA. The Ninth Circuit Court of Appeals, looking at what Congress did intend in IGRA in the case, U.S. v. 103 Electronic Gambling Devices, 223 F. 3d 1091 (9th Cir. 2000), determined that the three elements of bingo mandated in IGRA were the sole means to determine if a game was bingo and thus Class II. The court's opinion noted:

Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as class II bingo. There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria.

See 223 F. 3d at 1096. Thus, a game that includes the three fundamental elements of bingo set forth in IGRA is Class II bingo.

III. ONE TOUCH BINGO IS CONSISTENT WITH IGRA'S LEGISLATIVE HISTORY

The NIGC's proposed reinterpretation of one touch bingo also is consistent with IGRA's legislative history. In a frequently quoted passage from the legislative history, a Senate Report accompanying the bill stated: "The Committee specifically rejects any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility." See Senate Select Committee on Indian Affairs - Committee Report, 1988 U.S.C.C.A.N. at 3079. In other words, the ingenuity of gaming designers, which was intended to be constrained by the Gambling Devices Transportation Act (a/k/a the "Johnson Act"), is arguably intended to be given freer rein by IGRA in the context of Class II gaming.



The NIGC's proposed reinterpretation to allow one touch bingo as a Class II game gives tribes this "maximum flexibility." The result of the clear definition of bingo in IGRA and Congress' stated intent to allow tribes maximum technical flexibility is a mandate that sophisticated technical aids, such as one touch bingo, may be provided to assist in the play of games that are played within Congress' definition of bingo.

IV. NIGC'S CLASSIFICATION OF ONE TOUCH BINGO IS CONSISTENT WITH IGRA'S FIRST PURPOSE AND PROVIDES TRIBAL GAMING INDUSTRY WITH FINANCIAL CERTAINTY

The IGRA's Declaration of Policy notes several purposes to the Act. Foremost among those is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." The secondary purpose of the Act is to shield Indian gaming from corrupting influences. The third purpose of the Act includes the "establishment of a National Indian Gaming Commission...to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2701.

Tribes (and Congress' intent in passing the IGRA) will be best served if there is a balance between the IGRA's statutory limits on tribal gaming, on the one hand, and the first policy of the IGRA - promoting tribal economic development, self-sufficiency, and strong tribal governments, on the other hand. The NIGC's proposed reinterpretation of one touch bingo maintains this balance.

While Class II gaming may not be as profitable as Class III gaming, it can generate significant revenue for Indian tribes operating without Class III compacts. For example, the Seminole Tribe of Florida operated only Class II gaming until 2010, but it generated enough revenue to purchase the Hard Rock brand and properties for \$965 million in 2006. Alabama prohibits Class III gaming, yet the Poarch Band of Creek Indians' Class II casinos generated enough revenue to allow a reported tribal distribution of \$18,000 in 2013 to each of the Tribe's roughly 2,500 members – a total of \$45 million. Compact tribes often add Class II machines to their gaming floors to supplement Class III gaming revenue without violating their compacts. Finally, because Class II gaming on Indian land is exempt from state regulation, may not be limited through gaming compacts, and is not subject to the financial concessions sometimes demanded by states to operate slot machines, Class II games, such as one touch bingo, provide the tribes with leverage in compact negotiations.

In sum, the NIGC's proposed reinterpretation to classify one touch bingo as a Class II game is consistent with IGRA's primary purpose to promote tribal economic development, self-sufficiency, and strong tribal governments while maintaining the statutory limits for bingo set forth under the IGRA for Class II games.



V. CONCLUSION

As noted above, WMS supports the NIGC's proposed reinterpretation that one touch bingo is properly classified as a Class II game under the IGRA. One touch bingo satisfies the three essential elements of Class II games under the IGRA. The game's technological advances also provide the tribes with maximum flexibility in developing tribal gaming as called for by the IGRA's legislative history. Finally, in proposing to include one touch bingo as a Class II game, WMS believes that the NIGC is striking the right balance between maintaining IGRA's statutory limits on bingo and also serving the first purpose of the IGRA – to promote the tribal economic development, self-sufficiency, and strong tribal governments.

Respectfully submitted,

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