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## BULLETIN

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**No. 2003-3**

September 23, 2003

**Subject: Guidance on Classifying Games with Pre-Drawn Numbers**

The Indian Gaming Regulatory Act (IGRA) defines three classes of gaming, I, II, and III. The purpose in distinguishing between class II and class III gaming is that, under IGRA, class III gaming may be played only in conformance with a tribal-state compact. See 25 U.S.C. § 2710(d)(1)(C). Class II gaming, on the other hand, may be conducted where there is no compact. Class II games include bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. 25 U.S.C. 2703(7)(A); 25 C.F.R. § 5012.3(a), (b).

This Bulletin addresses one of the statutory requirements of the class II game of bingo: that the “holder of the card covers such numbers or designations when objects...are drawn or electronically determined.” 25 U.S.C. 2703(7)(A)(i)(II). It also addresses whether games similar to bingo must meet this requirement. We conclude that the statutory requirement for bingo is met only when numbers or designations are drawn after a player begins play of the game. We conclude further that, in order to constitute a game similar to bingo, numbers must like-wise be drawn after play of the game begins.

### DISCUSSION

IGRA defines class II gaming in relevant part to include:

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

25 U.S.C. § 2703(7)(A).

NIGC regulations define class II gaming to include:

- a. Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
  1. Play for prizes with cards bearing numbers or other designations;
  2. Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
  3. Win the game by being the first person to cover a designated pattern on such card;
- b. If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo[.]

25 C.F.R. § 502.3.

To constitute bingo under IGRA, therefore, a game must include certain elements. Among them is the requirement that players “cover” a previously designated arrangement of numbers or designations “when” such objects are drawn. 25 U.S.C. § 2703(7)(A)(II). IGRA also requires that a game be won by the first person covering a previously designated arrangement of numbers or designations on such cards. 25 U.S.C. §2703(7)(A)(III). In short, under IGRA, a game is bingo only if players are required to cover a certain designation in response to numbers being drawn and if the first person to cover a designated pattern wins the game.

The requirement that a player cover *when* objects are drawn means that games that use pre-drawn numbers cannot constitute bingo. Some have argued that, for the purposes of IGRA, “when” means “after” and that it should not matter how long after balls are drawn that the card is daubed, thus allowing for pre-drawn numbers. This is in opposition to the common meaning of the word “when.” Webster’s Collegiate Dictionary (10th ed.) defines the conjunction “when” as:

1a: at or during the time that: WHILE...b: just at the moment that...c: at any or every time that...2: in the event that: IF...3a: considering that...b: in spite of the fact that: ALTHOUGH...4: the time or occasion at or in which....

This definition is counter to the proposition that “when” means “at any point after.”

The draw by either a bingo blower or some other method where numbers are “electronically determined,” must occur in real time or very near in real-time to the actual play of the particular bingo game. IGRA requires as much. (See 25 U.S.C. § 2703(7)(A)(i)(II) requiring the holder of the bingo card to cover numbers “when” those numbers are drawn.) The act of covering the numbers must occur in close proximity to the drawing of those numbers or in “real time.” Allowing a game time to distribute numbers through a network of terminals to help ensure continuity of fast paced electronic bingo games would be logical. In our view, however, consistent with statutory intent, such “near real-time” play contemplates only the lapse of a minimal period of time necessary to accomplish these objectives. This time period would be measured in seconds, not hours

or days.

In bingo, designations are covered in response to bingo ball draws, in an attempt to create a winning pattern on a bingo card before another player does so. In Multimedia's MegaNanza series of games, pre-determined numbers are revealed on the screen at the same time as the corresponding numbers depicted on the "bingo card" shown on the screen are automatically covered by the system. Unlike traditional bingo, in MegaNanza, the numbers are chosen by a random number generator at some time prior to the cards being sold and then the *completed* games are stored in the host computer and sold to players. By the time the player begins participating, the game has been played within the machine and the machine distributes the completed game to the player. The winning cards are determined at the time the computer draws the numbers and matches them against the existing deck, not during the course of play. Therefore, the bingo player is not "covering" a previously designated arrangement and the "covering" is not happening "when" the objects are drawn.

### Games Similar to Bingo

Since games with numbers drawn before the cards are bought are not bingo, we then must decide whether these games might be variants of bingo such that they fall within the definition of "other games similar to bingo."

IGRA and NIGC's regulations include in class II, in addition to bingo, other games, specifically: pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo. 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3. Several of these games are described by NIGC in Bulletin 99-2 (August 18, 1999). While the phrase "pre-drawn" is not used in the Bulletin's descriptions, each of these games have, as part of their character, numbers that are chosen before the player plays the game. In the case of punch boards, we observed:

Each slip of paper has a number of combination of symbols printed on it....A player purchases a "punch" (a metal stylus) which entitles him to 'punch out' the hole of choice, thereby revealing the rolled up or folded slip of paper.

Play of tip jars is described as:

Players buy folded or sealed pieces of paper dealt from large glass jars in hopes of winning prizes. The pieces of paper conceal numbers or symbols that may entitle the purchaser to winnings immediately after opening the ticket.

Instant bingo is played with:

Tickets...made of paper products, the face of which is covered or otherwise hidden from view to conceal the numbers and letters.

In short, these games share a fundamental characteristic: numbers are designated, that is, pre-drawn, before the player enters the game.

Whether "other games similar to bingo may share this same fundamental characteristic is a question that has not yet been addressed. We do so now.

IGRA does not define other games similar to bingo. NIGC's regulations do. In July 2002, NIGC regulations modifying a prior definition went into effect. The regulation defines other games similar to bingo as:

Any game played in the same location as bingo...constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

25 C.F.R. §502.9. In the preamble to the regulations, the Commission explained that under the previous definition, games similar to bingo could include games that met the same precise statutory criteria set for bingo. Such a definition would be illogical, however, the Commission opined. If a game met each of the statutory requirements of bingo, the game would simply be bingo and a class of games similar to bingo would be unnecessary. Instead, the Commission said, games similar to bingo should be understood to be games:

that are bingo-like, but that do not fit the precise statutory definition of bingo...."[O]ther games similar to bingo" constitute a "variant" on the game and do not necessarily meet each of the elements specified in the statutory definition of bingo.

67 F.Reg. 41171 (June 17, 2002).

We understand games similar to bingo to be those that substantially meet bingo's statutory requirements, but fall short in some aspect. Fundamentally, the game must remain bingo as described by Congress in IGRA. But the game may contain a variation on one of the elements that, while it does not change the overall character of the game as bingo, does cause the game to not precisely meet the three statutory criteria.

The question before us then is whether any characteristics of bingo are so fundamental that a game without them cannot even be said to rise to the level of a variant of bingo and, if so, whether numbers drawn after the player enters the game is one of them.

We conclude that there are characteristics of bingo that are so critical that games lacking them cannot even be said to be a variant or bingo-like. Specifically, we find that having numbers drawn after game play commences is so critical to the character of bingo that games with pre-drawn numbers cannot be said to be games similar to bingo. We reach this conclusion based on the statutory construction of IGRA and case law addressing game classifications.

As noted above, IGRA requires that a player cover when the numbers or objects are drawn. 25 U.S.C. 2703(7)(A)(i)(II). The act of covering the numbers must occur in close proximity to the drawing of those numbers or in "real time." Covering numbers substantially later than numbers are drawn or determined is not consistent with the dictionary definition of "when." As a result, games in which numbers are not drawn and covered after play begins do not meet the second statutory criterion and are not bingo. <sup>1</sup>

Games similar to bingo, on the other hand, may lack an aspect of the statutory criteria. NIGC regulations group together pull-tabs, punch boards, tip jars, and instant bingo into the category of games similar to bingo. These games share a fundamental characteristic: winning numbers are established before play of the game. The effect is that the game has been won before a player participates in the game. Players are not playing against each other in real time. It might be, then, that the category of "other games similar to bingo" could also have pre-drawn winning numbers. However, if this were so, games similar to bingo would in effect be pull-tabs or instant bingo, games that the statute already covers. An interpretation of "other games similar to bingo" as allowing pre-drawn numbers would be a redundant category of games.

We think that avoiding such a statutory redundancy is not only better statutory

construction but also results in a conclusion that is in keeping with case law. In *Julius M. Israel Lodge of B'nai B'rith v. Commissioner of Internal Revenue*, 98 F. 3d 190 (5th Cir. 1996), the Fifth Circuit examined the differences between bingo and instant bingo for the purposes of the Internal Revenue. While Texas state law authorized play of both bingo and instant bingo, the federal appeals court agreed with the Commissioner of Internal Revenue that instant bingo did not constitute bingo and therefore did not fall within the federal tax code's exception to the definition of unrelated trade or business.

In reaching its decision, the court set out some fundamental differences between bingo and instant bingo. Using common definitions of bingo from dictionaries, the court stated:

The taxpayer's Instant Bingo is devoid of the critical element of bingo that runs through these ordinary, everyday definitions—that players place markers over randomly called numbers in an attempt to form a preselected pattern. Instant Bingo involves only the player's purchase of a prepackaged card..., and winning cards are those in which the preprinted appearance of numbers on the front of the card...matches the preprinted winning arrangement indicated on the reverse side of the card....A bingo game by any other name is not a bingo game....Instant Bingo is, for all practical purposes, a lottery.

98 F. 3d at 192-193.

## CONCLUSION

If games similar to bingo are, like instant bingo, games in which numbers are chosen or designated before the player plays the game, they do not share a "critical element of bingo." They do not share the element that "require[s] the player to participate in the game by covering the squares on his card." 98 F.3d at 193. This participation, the covering of numbers when they are drawn, is critical to bingo. A game that is bingo-like or a variant of bingo must include this element, regardless of what other characteristics they may or may not have. In short, games similar to bingo cannot use numbers that are drawn before play of the game starts. Otherwise, the game becomes instant bingo, a game that at least the Fifth Circuit has concluded is fundamentally different from bingo. The Commission concludes the same.

The holding in *Julius M. Israel Lodge of B'nai B'rith* also supports our view that state laws allowing play of games do not affect our analysis here.<sup>2</sup> States may designate whatever games are legal within their borders. That some state codes describe, for example, bonanza bingo as a pre-drawn game and allow it for play as it would a bingo game does not address the question at issue here: what constitutes bingo and games similar to bingo for the purposes of IGRA.

For additional information, contact the NIGC Office of General Counsel at (202) 632-7003.

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<sup>[1]</sup>As of November 4, 2003, this sentence was corrected to reflect that if numbers are not drawn after game play begins, the game cannot be bingo. When this Bulletin was originally issued, the sentence was incorrectly stated.

<sup>[2]</sup>The taxpayer in this case argued that bingo and instant bingo were authorized under

Texas law. The Fifth Circuit dismissed the argument, saying “As a threshold matter, we dismiss the taxpayer’s contention that we must look to Texas state law in determining whether Instant Bingo is exempt from federal taxation under the federal tax code.” 98 F. 3d at 191, n.2.