



by Knute Knudson

## Class II Gaming: The Importance of Getting It Right

We may be in the final stretch of the promulgation of federal rules regarding technologic aids to the play of Class II games. "May be" is the operative term in that sentence. The National Indian Gaming Commission is considering proposing up to four regulations governing the operation of Class II games. Regulations under consideration include Technical Standards, Classification Standards, a definition of an Electronic or Electromechanical Facsimile, and Minimum Internal Control Standards (MICS).

By the time this article appears it's virtually certain that NIGC will have published proposed regulations governing the operation and play of Class II games. What is not known is whether NIGC will publish all four proposed regulations or a combination including just some of the four.

And, of course, what is proposed will not necessarily be

what is published as a final rule - if anything at all is published as a final rule. The comment period following publication of proposed regulations will certainly generate a wide range of objections and alternative approaches. NIGC will then have the option to incorporate some, all, or none of the comments received in what they may ultimately publish.

It has been said all along that it's essential that those involved in the Class II rules promulgation process get it right. That remains the case today - it is critical to get it right. We need to get Class II games right for several reasons. Two critical reasons are the ongoing support of tribal government functions and the necessity to provide a viable option to Class III games.

Class II games support tribal government activities for many sovereign tribes and their members. There are 50,000 electronic aids to the play of Class II games operated by tribes in several states. Tribes across the country rely on revenues from Class II bingo games to support tribal services. Tribes ranging from the Seminole and Miccosukee Tribes in Florida, to the Kickapoo Tribe in Texas, to the Lytton Band in California and many tribes in between rely on the revenues from Class II games to support essential tribal services.

Class II games are also critical to give tribes a viable alternative to Class III games and thus to give tribes leverage in Class III compact negotiations. Congress, through the Indian Gaming Regulatory Act (IGRA), intended that tribes and states be on equal footing as they negotiated Class III gaming compacts. However, when the US Supreme Court disallowed IGRA's judicial remedy against states that would not bargain in good faith, states and tribes were left on very unequal footing - states wishing to not compact for Class III games realized a distinct advantage. Tribes were left with one card to play in such a case - Class II games; not the slowest, least appealing games, but viable Class II games.

There is a common misconception by some in the federal and state governments that Congress intended that Class II bingo games operated by tribes be so distinct from the latest and greatest Class III technologies that they be limited to only the technology available in 1988 at the time of IGRA's enactment - technology which today is arcane and outdated. In fact, the opposite is true.

Congress anticipated what it could not foresee regarding Class II games. The Committee Report accompanying

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IGRA at the time of enactment noted that: “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.” (Senate Select Committee on Indian Affairs - Committee Report, 1988 U.S.C.C.A.N. at 3079.) Getting it right in promulgating Class II regulations certainly means protecting the maximum flexibility Congress intended for tribes.

The current chapter of the Class II rules promulgation process arguably started in January of 2004 when NIGC solicited members for its Joint Federal-Tribal Class II Game Classification Standards Advisory Committee. This group was ultimately joined by the Technical Standards Tribal Advisory Committee (TTAC) and the MICS Tribal Advisory Committee (MTAC). This chapter became substantially more interesting in March of 2004 when the US Supreme Court refused to hear Department of Justice challenges to the use of technologic aids to the play of Class II games

in the Santee Sioux and Seneca Cayuga cases.

Those two events marked a shift from the court battles that had previously defined the process of determining the nature of Class II games to a process to develop regulations which, depending on your point of view, should support already well-defined Class II games or would themselves define Class II games. In 2006 NIGC published proposed regulations for the Classification Standards and Technical Standards to be used for electronic aids to Class II games. NIGC also proposed a definition for an Electronic or Electromechanical Facsimile.

The manufacturers’ involvement was ratcheted up several notches in September and December of 2006 when they became more deeply involved in providing technical input for the proposed Technical Specifications and later for draft MICS. To that end manufacturers organized as the Tribal Gaming Work Group (TGWG) to assist the tribes involved in the regulation effort. Manufacturers were motivated to assist because getting it right also means having technical standards and MICS that help ensure the operation of fair, accurate games for the sake of all involved - tribes, players, and manufacturers.

After lengthy comment periods during which many concerns about the proposed regulations were received, the three proposed regulations from 2006 were ultimately pulled by NIGC in February of this year. Since then NIGC is working on changed proposed regulations, many, but certainly not all, elements of which are the result of input from the folks at TTAC, MTAC and TGWG.

In this effort involving manufacturers as well as select tribal representatives and representatives of tribal gaming operations, dozens of people, traveled thousands of miles, spent scores of nights in hotels, drank gallons of coffee, used terabytes of email bandwidth, and spent hundreds of hours on conference calls. Why did they do all this? To get it right.

This has been an effort with input from around the country. Tribes and vendors serving tribes in California, New York, Washington, Nebraska, Alabama, Montana, the Dakotas, Arizona, Michigan, Florida, Oklahoma and elsewhere were represented. These manufacturers and tribal representatives have dedicated themselves to getting it right when it comes to Class II games. Our work isn't done in this regard and the conclusion of this chapter in the rules promulgation process will be instructive as to the ultimate nature of regulations for Class II games.

All involved, on behalf of tribes, are working to get it right. We can't afford not to. ♣

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