[FR Doc. 02–15133 Filed 6–12–02; 9:57 am]
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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 3

RIN 3038–AB89

Registration of Intermediaries

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules; correction.

SUMMARY: The Commodity Futures Trading Commission (the ''Commission'' or ''CFTC'') published in the **Federal Register** of June 6, 2002, a document concerning final rules relating to the registration of intermediaries. Inadvertently, the Commission cited to an incorrect paragraph designation. This document corrects that error.

EFFECTIVE DATE: Effective on June 17, 2002.

FOR FURTHER INFORMATION CONTACT: Lawrence B. Patent, Associate Chief Counsel, or Michael A. Piracci, Attorney-Advisor, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5430.

SUPPLEMENTARY INFORMATION: The Commission published in the **Federal Register** of June 6, 2002, a document concerning final rules relating to the registration of intermediaries.[1] In that document, the Commission indicated that it was revising paragraph (a)(2)(i) of Rule 3.10. This revision was actually of paragraph (a)(2), because the Commission had previously redesignated paragraph (a)(2)(i) as paragraph (a)(2).[2] This correction makes that change.

In the final rule document appearing on page 38874 in the issue of Thursday, June 6, 2002, make the following corrections: in § 3.10, in the first column, in the amendatory instruction Number 3, second line, ''paragraph (a)(2)(i)'' should read ''paragraph (a)(2)''; and in § 3.10, in the second column, sixth line, ''(2)(i)'' should read ''(2)''.

Dated: June 11, 2002.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 02–15178 Filed 6–14–02; 8:45 am]
BILLING CODE 6351–01–M

[1] 67 FR 38869 (June 6, 2002).

[2] *See,* 66 FR 53510, 53518 (Oct. 23, 2001).

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 502

RIN 3141–AA10

Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (Commission) amends three key terms in the Indian Gaming Regulatory Act, ''electronic, computer or other technologic aid,'' ''electronic or electromechanical facsimile,'' and ''game similar to bingo.'' The Commission believes these amendments bring stability and predictability to the important task of game classification.

EFFECTIVE DATE: July 17, 2002.

FOR FURTHER INFORMATION CONTACT: Penny Coleman, Deputy General Counsel, National Indian Gaming Commission, Suite 9100, 1441 L Street, NW, Washington, DC 20005. Fax number: 202–632–7066 (not a toll-free number). Telephone number: 202–632–7003 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. 2701–21 (IGRA or Act), creating the National Indian Gaming Commission (NIGC or Commission) and developing 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 regulate class I gaming exclusively.

''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. 25 U.S.C. 2703(7)(A). Class II gaming, however, does not include any banking card games, electronic or electromechanical facsimiles of any game of chance or slot machines of any kind. 25 U.S.C. 2703(7)(B). Class II gaming thus includes high stakes bingo and pull tabs, as well as non-banking card games such as poker. Tribal governments and the NIGC share regulatory authority over class II gaming without the involvement of state government.

Class III gaming, on the other hand, 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. For a compact to be effective, the Secretary of the Interior must approve the terms of the compact. 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 and roulette, pari-mutuel wagering, and banking card games, such as blackjack. While such gaming usually requires a tribal-state compact, a tribe may operate class III gaming under gaming procedures issued by the Secretary of the Interior if a state has refused to negotiate in good faith toward a compact. Because of the compact requirement, both the states and tribes possess regulatory authority over class III gaming, with the NIGC retaining an oversight role. Jurisdiction over criminal violations is vested in the United States Department of Justice, which also assists the Commission by conducting civil litigation on its behalf in federal court.

Because of the varying levels of tribal, state, and federal involvement in the three classes of gaming, the proper classification of games is essential. As a legal matter, Congress defined the parameters for game classification when it enacted IGRA. As a practical matter, however, several key terms were not specifically defined, and thus subject to more than one interpretation.

Issues Unresolved in Congressional Definitions

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 IGRA, Congress recognized the right of tribes to use ''electronic, computer or other technologic aids'' in connection with 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. Since class III gaming requires an approved tribal-state compact to be lawful (an unattainable plateau for some tribes), definitions articulating the proper distinctions between the two classes are vital to sound execution of the law.

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. However, the Commission did not apply a plain meaning approach in its early construction of IGRA or in its regulatory definitions, and even if it had, the terms can nonetheless be read to overlap.

The distinction between class II ''electronic aids'' and class III ''electromechanical facsimiles'' is further complicated by the extent to which class II gaming is affected by the federal Gambling Devices Act, 15 U.S.C. 1171–78, more commonly known as ''the Johnson Act.'' The Johnson Act predates IGRA by thirty years and generally prohibits the manufacture or possession of ''gambling devices'' within specific areas of federal jurisdiction, including Indian country. 15 U.S.C. 1175. The term ''gambling device'' is defined very broadly in the Johnson Act. It includes ''slot machines,'' or ''any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling,'' or ''any subassembly or essential part intended to be used in connection with any such machine or mechanical device[.]'' 15 U.S.C. 1171(a)(1–3).

IGRA explicitly creates an exception to the Johnson Act for gaming devices operated under an approved tribal-state compact for class III gaming, 25 U.S.C. 2710(d)(6); however, it does not specify the effect of the Johnson Act on class II gaming. Since the Johnson Act defines gambling devices very broadly, the omission gives rise to more than one interpretation on the question of the reach of the Johnson Act in relation to devices used in conjunction with bingo and other class II gaming. For example, the common bingo ball blower, which has been used widely in bingo games across the country to determine the order in which bingo numbers are called, falls within the definition of gambling device. Although it is virtually inconceivable that Congress intended the Johnson Act to preclude the use of bingo blowers in class II gaming, IGRA does not specifically address the question.

1992 Commission Definitions

Faced with the task of sorting through these issues of construction, the newly established Commission set out to provide guidance to the Indian gaming industry by defining certain key terms in IGRA. A ''notice and comment'' rulemaking initiative commenced soon after the Commission became operational in 1992. The final definitional rule was published on April 9, 1992. 57 FR 12382.

The term ''electronic, computer or other technologic aid'' to class II gaming was defined as ''a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used: (a) Is not a game of chance but merely assists a player or the playing of a game; (b) is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and (c) is operated according to applicable Federal communications law.'' 25 CFR 502.7. ''Electronic or electromechanical facsimile'' was defined by reference to the Johnson Act to mean ''any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3).'' 25 CFR 502.8. Since the IGRA specifies that class II games are to be broadly read to include bingo and other games similar to bingo, the Commission defined the term ''game similar to bingo'' by reference to the definition of bingo elsewhere in the regulations. 25 CFR 502.9.

Incorporation of the Johnson Act in the 1992 Definitions

In 1992, the Commission viewed the relationship between the Johnson Act and IGRA as key to interpreting congressional intent concerning which gaming-related technology is authorized for class II gaming and which technology might cause what would otherwise be considered class II gaming to become class III. In its analysis, the Commission noted three key points. First, the Johnson Act prohibits the use of gambling devices in Indian Country. 15 U.S.C. 1175. Second, the only explicit exception to the Johnson Act in Indian Country is set forth in 25 U.S.C. 2710(d)(6), which indicates that the Johnson Act shall not apply to compacted class III gaming. 57 FR 12382, 12385 (April 9, 1992). Finally, class II gaming under IGRA is permitted for tribes in states where it is permitted for any other person or entity and is not specifically prohibited on Indian lands by Federal law. 25 U.S.C. 2710(b)(1)(A). Relying on language in a Senate Report on IGRA, the Commission interpreted the reference to ''Federal law'' to mean the Johnson Act. Under this interpretation, the Johnson Act applies even in the context of class II gaming. *See* S. Rep. No. 100–446, at 9 (1988).

Under the Commission's interpretation, IGRA required independent compliance with the Johnson Act except where the Indian gaming activity is authorized by a tribal-state compact. This was a reasonable approach in relation to crafting a regulatory definition of ''slot machine of any kind'' because the term is well defined by the Johnson Act and because congressional intent was clear.

In the context of defining electronic or electromechanical facsimile, however, incorporation of the Johnson Act was less satisfactory. The Commission's facsimile definition includes: ''any gambling device'' as defined by sections 1171(a)(2) or (3) of the Johnson Act. 25 CFR 502.8. Because the Johnson Act is so broadly construed, a facsimile thus includes *any* device designed and manufactured for use in connection with gambling, as well as any sub-assembly or essential part intended to be used for such purposes. This definition departs substantially from any plain meaning of the term.

With the benefit of experience and hindsight, it has become increasingly clear that by incorporating the Johnson Act into its ''electronic or electromechanical facsimile'' definition, the Commission defined a key term in an overly broad manner. Worse, use of the definition produces patently nonsensical results in certain circumstances. We again turn to the common bingo ball blower, a device used to randomly generate numbers for bingo games.

Few would argue that Congress intended the Johnson Act to prohibit the use of bingo blowers or other aids in class II gaming, particularly since the plain language of the Act anticipates such use of electronics and technology. Nevertheless, the broad interpretation of ''gambling device'' contained in the Johnson Act clearly sweeps bingo blowers within its ambit.

A chief reason for the Johnson Act's broad construction is that as a criminal statute it is intended to restrict the possession, use, and transportation of gambling devices. The principles of construction used by the courts in interpreting the Johnson Act were designed to ''anticipate the ingeniousness of gambling machine designers.'' *Lion Manufacturing Corp.* v. *Kennedy,* 330 F.2d 833, 836–837 (D.C. Cir. 1964). Accordingly, courts have found the Johnson Act to cover a wide variety of machines. *See, e.g., United States* v. *H.M. Branson Distrib. Co.,* 398 F.2d 929, 933 (6th Cir. 1968) (pinball machines with knock-off meters that can accumulate free games); *United States* v. *Two (2) Quarter Fall Machines,* 767 F.Supp 153, 154 (E.D. Tenn. 1991) (machines where the fall of coins could deliver hanging coins into a pay-off chute); *United States* v. *11 Star-Pack Cigarette Merchandiser Machines,* 248

F.Supp. 933, 934 (E.D. Pa. 1966) (an attachment on a vending machine that could deliver a free pack of cigarettes); *United States* v. *Wilson,* 475 F.2d 108 (9th Cir. 1973) (a machine that sold store coupons and prize tickets in a prearranged order from a preprinted bundle even though the player could see the coupon or ticket he was buying).

The traditional broad construction of the Johnson Act encompasses numerous devices manufactured to assist in the play of class II games that the Commission now believes Congress presumed to constitute acceptable technologic aids. In an oft-quoted passage from the legislative history, a Senate Report accompanying the bill that became IGRA indicated that ''tribes should be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.'' *See* S. Rep. No. 100–446, at 9 (1988). In other words, the ingenuity of gaming designers, which was designed to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of class II gaming.

Incorporating the Johnson Act definition of gambling device into the Commission's definition of ''electromechanical facsimile'' is illogical in certain other respects as well. A good example is the roulette wheel. As the Department of Justice noted in its comments to our proposal to strike the definition of facsimile, equating ''electromechanical facsimile'' to ''Johnson Act gambling device'' can lead to absurdity. A roulette wheel, for example, clearly meets the definition of a Johnson Act gambling device, but it is neither ''electronic'' nor a ''facsimile.'' In other words, although incorporation of the Johnson Act into the IGRA regulatory definitions seemed, in 1992, to be an expedient method of harmonizing two competing federal statutes, it was imperfect at best and, in the final analysis, created more problems than it solved.

In adopting the definitions, the Commission apparently recognized the problem and sought to sidestep it by including ''bingo blower'' as one of several permissible devices to be used as a technological aid to class II gaming. This strategy resolved the specific problem of the bingo blower, but failed to address the underlying conceptual problem. Consequently, substantial uncertainty remains as to a myriad of other devices that, like the bingo blower, provide electronic or technological assistance to class II gaming, but that nevertheless also meet the expansive definition of electromechanical facsimile by virtue of its incorporation of the Johnson Act. Moreover, this uncertainty has translated into a substantial amount of litigation, much of which has produced results unfavorable to the Commission's interpretation of the interplay between IGRA and the Johnson Act.

Consultation With the Department of Justice

On several occasions during the past ten years, the problems noted above have caused the Commission to informally reconsider the correctness of incorporating the Johnson Act into its definition of electromechanical facsimile. Since enforcement of the Johnson Act is committed to the discretion of the Department of Justice, the Commission and the Department share an interest in the proper resolution of this issue.

Like the Commission, the Justice Department has struggled with these questions of interpretation regarding the applicability of the Johnson Act in relation to Indian gaming. In 1996, the Department's position was that Congress expressly contemplated the use of equipment in class II Indian gaming that would otherwise fall within the Johnson Act. In 2001, however, the Justice Department reevaluated its position, indicating a view that the Johnson Act prohibits any technology that meets its terms, including technological aids to class II gaming.

In the meantime, a series of federal circuit court decisions, discussed more fully below, have informed this Commission's view that its original construction of IGRA and resulting definitional regulations did not properly capture the intent of Congress in relation to the distinction between permissible aids to class II games and impermissible class III facsimiles.

Lack of Judicial Endorsement for 1992 Definitions

In hindsight, and with the guidance of the courts, the inconsistencies in purpose between IGRA and the Johnson Act are more readily apparent. The federal courts, including no less than three United States circuit courts of appeal, have been virtually unanimous in concluding that the Commission's definitions are not useful in distinguishing between technologic aids and facsimiles. Rather than apply the Commission's rules, the courts instead conducted a plain meaning analysis juxtaposed against the language of the statute and the Senate Report. While most simply ignored the Commission's definitions, one court openly criticized the Commission's rule as unhelpful. *Cabazon Band of Mission Indians* v. *National Indian Gaming Commission,* 14 F.3d 633 (D.C. Cir. 1994) (holding that the scope of gaming determination at issue in the case could be made by looking to the statute alone and without examining the Commission's regulatory definitions); *Sycuan Band of Mission Indians* v. *Roache,* 54 F.3d 535, 542 (9th Cir. 1994) (resorting to the dictionary definition of facsimile as ''an exact and detailed copy of something,'' rather than using the regulatory definition); *Diamond Game Enterprises* v. *Reno,* 230 F.3d 365, 369 (D.C. Cir. 2000) (''Boiled down to their essence, the regulations tell us little more than that a class II aid is something that is not a class III facsimile.''). In sum, these courts have implicitly rejected the Commission's definition of ''electromechanical facsimile,'' which incorporates the Johnson Act, and have instead used a plain meaning approach to interpret this key term.

In addition to the lack of deference noted above, two United States circuit courts have reached decisions that can be construed to be at odds with the Commission's definition of facsimile, though at least one of them gave deference to the Commission's findings as to the devices in question. *United States* v. *103 Electronic Gambling Devices,* 223 F.3d 1091, 1095, 1102 (9th Cir. 2000); *United States* v. *162 Megamania Gambling Devices,* 231 F.3d 713 (10th Cir. 2000).

The uncomfortable result is that the Commission cannot faithfully apply its own regulations and reach decisions that conform with the decisions of the courts. Such inconsistency frustrates the Commission's ability to properly discharge its duties under IGRA.

Moreover, the courts' unwelcome reception to the Commission's regulatory definitions of electronic aids and electromechanical facsimile stands in vivid contrast to other definitional regulations promulgated by the Commission. In most circumstances, the Commission's work has garnered substantial judicial deference. *See Shakopee Mdewakanton Sioux Community* v. *Hope,* 16 F.3d 261, 264 (8th Cir. 1994) (recognizing ambiguity in the definition of class II and upholding the NIGC's regulations that provide that keno is a class III game); *162 Megamania Gambling Devices,* 231 F.3d at 719–20 (turning for guidance to the Commission's definition of ''game similar to bingo'' and noting that the regulations are entitled to deference); *103 Electronic Gambling Devices,* 223 F.3d at 1097 (''The NIGC's conception of what counts as bingo under IGRA * * *

is entitled to substantial deference.'') Accordingly, the Commission believes that the courts will be receptive to its efforts to bring greater clarity to these key definitions.

Congressional Criticism of the 1992 Definitions

In addition to the developments in the federal case law, the Commission's authorizing committee, the United States Senate Committee on Indian Affairs, has urged the Commission to reconsider these definitions. In a July 10, 2000, letter to the Commission Chairman, Senators Ben Nighthorse Campbell and Daniel K. Inouye, then Chairman and Vice-Chairman, respectively, of the Committee, urged the Commission to revise its definitions pertaining to class II gaming, saying:

> Since the NIGC first issued its regulations on class II gaming, uncertainty has developed among the Indian tribes, states, and regulatory bodies as to which games are properly classified as class II under the act. This is particularly true where tribes offer class II games that utilize ''technological aids'' as the IGRA expressly permits. We also understand that some of these games fall under the definition of ''gambling devices'' under the Johnson Act (15 U.S.C. 1171 et seq.). The conflict between IGRA and the Johnson Act has resulted in repeated legal clashes between Indian tribes and state and federal law enforcement agencies.
>
> We think that it is clear that the NIGC has the authority to resolve this issue.

In a similar letter dated July 11, 2000, nine congressmen also encouraged the Commission ''to bring some clarity to this issue.''

Reconsideration of the 1992 Definitions

In the decade since 1992, the NIGC has had an opportunity to work extensively with its regulatory definitions and also to develop additional experience in Indian gaming. As the Commission's expertise has evolved, the courts have also been active, providing increasingly clearer guidance on the proper interpretation of the relevant statutes. In light of the courts' apathy or antipathy toward certain NIGC definitions discussed above, and in light of requests among the public, the industry, and Congress, the NIGC has determined that several of its key definitions must be revised.

The Commission recognizes that an agency should move with great care in changing definitions that have been in place for a decade. After much reflection, the Commission revises the definitions in a manner that reaffirms, rather than disrupts, settled industry expectations. Today's Final Rule more properly captures the intent of Congress as to the distinction between permissible class II aids and prohibited class III facsimiles, without compromising Congress' intent to prohibit the play of facsimiles absent an approved tribal-state compact.

Requests for Comments

The Commission first issued a proposed rule for comment on June 22, 2001, proposing to withdraw its definition of electronic or electromechanical facsimile. The vast majority of comments favored the Commission's proposal to revise its definition of electronic or electromechanical facsimile by deleting reference to the Johnson Act. A number of commenters, however, including the Department of Justice, expressed the view that mere removal of this definition would not be sufficient to provide adequate guidance. Furthermore, many also expressed the view that additional revisions were needed for two other related terms: ''electronic, computer or other technological aid'' and ''game similar to bingo.''

After careful consideration, the Commission recognized that the commenters were correct in asserting that the simple removal of the definition would not be sufficient to achieve the desired level of clarity with regard to game classification. Accordingly, the Commission revised its proposed facsimile definition and crafted two new definitions addressing technological aids and games similar to bingo. On March 22, 2002, the Commission published a proposed rule for final comment (67 FR 13296). The comment period, extended to May 6, 2002, resulted in the receipt of fifty-two comments.

Summary of Comments

The vast majority of commenters express strong support for the Commission's proposal to revise its definitional regulation. While differences exist as to recommended language, most support removing reference to the Johnson Act from the facsimile definition and thus from the game classification analysis.

The one common ground of nearly all commenters is a frustration with achieving the right interplay between IGRA and the Johnson Act. Some commenters suggest that *any* machine or device meeting the Johnson Act definition of a gambling device would have to be characterized as class III. This, they assert, would be true even if the machine or device could be fairly characterized as a technologic aid to the play of a class II game. The Commission rejects this comment determining that such an approach renders meaningless the technologic aid language in IGRA, and ignores the analysis of a nearly unanimous judiciary. Taken to its logical extreme, an analysis consistent with this view would produce even greater disharmony in distinguishing aids and facsimiles than exists under the current definitions.

The Commission comes to this conclusion with the benefit of ten years' experience since adoption of the original definition regulations and with the advantage of the views of the federal judiciary on the meaning of the language in IGRA. Reaching this conclusion has not been easy. In part, the confusion can be traced to the Commission's original definition regulations. The Commission now believes that in the infancy of IGRA, its original definition regulations simply had not fully reconciled the language of IGRA with the Johnson Act. The Commission now determines that IGRA does not in fact require an across-the-board treatment of all Johnson Act gambling devices as class III games. Stated differently, ''Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game, and is played with the use of an electronic aid.'' *U.S.* v. *162 MegaMania Gambling Devices,* 231 F.3d 713, 725 (10th Cir. 2000).

This is best illustrated by considering the bingo blower. The Commission's original regulation listed bingo blowers as class II technologic aids, a categorization that has not been seriously challenged and that was accepted without significant scrutiny. *Cabazon Band of Mission Indians* v. *NIGC.* (DDC 1993) 827 F. Supp. 26 at 31, aff'd 14 F.3d 633 (D.C. Cir. 1994), cert. Den. 512 U.S. 1221 (1994) (''* * *the Johnson Act applies only to slot machines and similar devices (including the pull-tab games here in issue), not to aids to gambling (such as bingo blowers and the like)).'' The identification of bingo blowers as class II technologic aids is also consistent with IGRA's legislative history. (''That section [15 U.S.C. 1175] prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto.'' S.Rep. No.100–446, at 12 (1988).) When employed in gaming, though, bingo blowers are nothing more or less than random number generators.

Random number generation is the creation of numbers for use in games of chance and may occur in a wide variety of ways. Video gambling devices, for example, use computer software to generate numbers at random. Dice, cards, or wheels may also be used.

Significant to the Commission's analysis is the fact that both a bingo blower and a roulette wheel function as random number generators. That is, both produce, on a random basis, the numbers that will determine winners in games of chance. The Johnson Act specifically identifies roulette wheels as an example of a gambling device. 15 U.S.C. 1171(a)(2). Bingo blowers also meet the broad, Johnson Act definition of a gambling device, yet are rightfully classified as technologic aids under IGRA. The physical and operational characteristics of these devices, however, cannot be legally distinguished. The only real distinction between roulette wheels and bingo blowers is the games that they support. Bingo blowers generate numbers for class II games of chance, while roulette wheels generate numbers for class III games of chance. Because of their inconsistent purposes, inclusion of the Johnson Act in a game classification analysis undermines the fundamental principles of IGRA.

There are other such illustrative anomalies among gambling devices that are used as random number generators. Both keno and lotteries are class III games, but the ''rabbit ears'' used in keno and the ping-pong ball blowers often used to select lottery winners bear a striking resemblance, in appearance and function, to bingo blowers. Conversely, it would be fully consistent with IGRA to employ the kind of computerized random number generation used in video gaming machines, rather than a blower, to draw numbers for the play of bingo, particularly in light of the fact that IGRA specifically allows for electronic draws in the play of bingo. 25 U.S.C. 2703(7)(A)(i)(II).

From the Commission's perspective, the Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis under IGRA. As illustrated above, this is due in large part to its fundamentally different purpose. The Johnson Act is intended to determine whether something is a ''gambling device.'' IGRA, on the other hand, is intended to distinguish between classes of games. Within the context of IGRA, there is no question as to ''gambling'' per se—all Indian gaming is ''gambling.'' Accordingly, determining whether the Johnson Act covers a particular device simply does not answer the question relevant to Indian gaming: whether the game is class II or class III.

The appropriate threshold for a game classification analysis under IGRA has to be whether or not the game played utilizing a gambling device is class II. If the device is an aid to the play of a class II game, the game remains class II; if the device meets the definition of a facsimile, the game becomes class III. This analytical framework is fully consistent with that adopted by the three federal circuits that have squarely addressed the issue and determined that the Johnson Act does not prohibit technological aids to class II gaming. *See United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technological aids to the play of bingo); *Diamond Game Enterprises* v. *Reno,* 230 F.3d 365 (D.C. Cir. 2000) (noting that class II aids permitted by IGRA do not run afoul of the Johnson Act); *U.S.* v. *162 MegaMania Gambling Devices,* 231 F.3d 713 (10th Cir. 2000)(concluding that Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game, and is played with the use of an electronic aid). *See also United States* v. *Burns,* 725 F. Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to class II gaming and therefore tribes may use ''gambling devices'' in the context of bingo).

Because Congress intended to permit the use of electronic technology in class II gaming (even if the device might otherwise fall within the ambit of the Johnson Act), the important factor in a game classification analysis is whether the technology is assisting a player or the play of a class II game. Accordingly, the Commission's amended definition of electronic, computer or other technologic aid retains its elemental definition in subsection (a). To assist in the analysis under subsection (a), a set of analytical factors (subsection (b)), and specific examples of technologic aids (subsection (c)) have also been included. The Commission believes this modification is responsive to those commenters who were unclear as to how proposed subsections (a) and (b) were intended to interact.

The list of examples contained in the proposed rule received mixed comments. Those opposing the list felt that the approach creates a presumption that other machines or devices unlike those specifically listed could not be allowable aids. Others requested clarification as to whether the list is non-exclusive. The list is intended to assist the public and the industry in interpreting the scope of permissible aids by enumerating examples that have already been deemed lawful. This list is not comprehensive. The Commission is fully aware that other machines or devices not included in the list of examples can satisfy the definition of technologic aid and thus be a permissible form of class II gaming.

One commenter suggests that if it is determined that gambling devices can be used in connection with the play of class II games, IGRA still requires a tribal-state compact for operation of the device. The Commission does not believe that there is textual support for such a proposition in IGRA or that Congress intended the compacting process to be applicable in any way to class II gaming. ''S.555 [IGRA] provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming.'' S.Rep. No. 100–446, at 1 (1988).

Several commenters believe the proposed definition of technologic aid should be expanded to reflect that broadening participation is an important characteristic of an aid. The Commission agrees that this is an important indicator as to whether a machine or device is a technologic aid, but also recognizes that it is not a required element. This factor was therefore added to subsection (b) of the definition and should be viewed as strong indication that the machine or device is a technologic aid.

Several commenters suggest that the requirement that an aid be ''readily distinguishable'' from a facsimile is vague. Some argue that this language could possibly create a third category of devices falling somewhere outside both the definition of aid and facsimile. The Commission agrees that the reference has not proven useful in distinguishing between aids and facsimiles, and has therefore removed the reference.

Others suggest that the language ''[i]s readily distinguishable from the playing of an electronic or electromechanical facsimile of a game of chance'' within the aid definition should be qualified by adding the phrase ''in which a single participant can play the game only with or against the device rather than with or against other players.'' Others suggest that the same language should be utilized to limit the facsimile definition. In crafting these two new definitions, the Commission focused upon several key factors.

First, the Commission finds it particularly significant that IGRA specifically provides for an electronic draw in bingo games. 25 U.S.C. 2703(7)(A)(i)(II). Second, greater freedom with regard to class II gaming was clearly intended by the Congress. (''[T]ribes should be given the opportunity to take advantage of modern methods of conducting class II

games and the language regarding technology is designed to provide maximum flexibility.'' S. Rep. No. 100–446, at 9 (1988).) Reading this information along with the judicial analysis in several key cases, the Commission concludes that in the case of bingo, lotto, and other games similar to bingo, the definition ''electronic or electromechanical facsimile'' should be more narrowly construed. See S.Rep. No.100–446 (1988); *United States* v. *103 Electronic Gambling Devices,* 223 F.3d 1091, 1102 (9th Cir. 2000); *U.S.* v. *162 MegaMania Gambling Devices,* 231 F.3d 713 (10th Cir. 2000).

IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a *wholly* electronic format, provided that multiple players are playing with or against each other. These players may be playing at the same facility or via links to players in other facilities. A manual component to the game is not necessary. What IGRA does not allow with regard to bingo, lotto, and other games similar to bingo, is a wholly electronic version of the game that does not broaden participation, but instead permits a player to play alone with or against a machine rather than with or against other players. To ensure maximum clarity, the revised definitions include appropriate language establishing these parameters.

Several commenters suggest that the proposed definitions of aid and facsimile are circular because of their cross referencing. The Commission agrees, but also notes that it is important to state clearly when terms are intended to be mutually exclusive. The Commission revised the definitions to accommodate the concern, yet still address the Commission's view that, as a general rule, an aid and a facsimile are mutually exclusive.

One commenter suggests that the focus of the facsimile definition should be on the device rather than the format of the game. The Commission disagrees. The Commission reviews aids and facsimiles as part of its analysis to classify games. Therefore, the focus of the facsimile definition is properly on the game.

One commenter suggests that the Commission use the term ''resembles'' or ''simulates'' rather than ''replicates.'' The Commission concludes that these terms are not necessarily more precise than the term ''replicates.'' It is also noteworthy that the courts have largely utilized the term ''replicates.'' *See e.g. Cabazon Band of Mission Indians* v. *National Indian Gaming Commission,* 14 F.3d 633, 636 (D.C. Cir. 1994); *United States* v. *162 Megamania Gambling Devices,* 231 F.3d 713, 724 (10th Cir. 2000).

''*Game Similar to Bingo*''

Several commenters suggest that the proposed definition is not useful because it provides a single definition for unrelated types of games. Including pull tabs, lotto, punch boards, tip jars, and instant bingo in the definition was viewed as creating confusion. Still others object to the proposed definition on the grounds that the restrictions are contrary to Congress' definition of ''bingo.'' Upon reflection, the Commission agrees and has made appropriate revisions.

Several commenters suggest that the Commission should not adopt a definition of pull tabs, but allow the definition to evolve on a case-by-case basis. Another commenter noted that the game lotto does not contain a finite deal. Some commenters suggest inserting IGRA's requirement that these games must be played in the same location as bingo. Suitable changes were made in response to these comments.

An overwhelming number of commenters object to the proposed definition requiring the use of paper or other tangible medium. Others assert that the term ''preprinted'' is ambiguous. The majority of commenters feel that these requirements are not consistent with federal case law, in part because they would eliminate the lawfully recognized use of electronic cards. *United States* v. *103 Electronic Gambling Devices,* 223 F.3d 1091 (9th Cir. 2000); *U.S.* v. *162 MegaMania Gambling Devices,* 231 F.3d 713 (10th Cir. 2000). The requirements were also seen to disregard the legislative history of IGRA, which allows tribes maximum flexibility in using modern technology. S. Rep. No. 100–446, at 9 (1988). The Commission agrees that the proposed language was overly broad and inconsistent with both case law and legislative history. These requirements have therefore been removed.

It is particularly noteworthy that the statutory listing of specific games followed by the phrase, ''and other games similar to bingo,'' can be read in two ways. 25 U.S.C. 2703(7)(A)(i)(III). First, it can be interpreted to mean merely that the specified games are similar to bingo. The Commission finds this interpretation unlikely. Alternatively, this language can be interpreted to leave class II open to other games that are bingo-like, but that do not fit the precise statutory definition of bingo. This second reading, that the class was left open to a group of non-specific, bingo-like games, or ''variants'' on the game of bingo, is consistent with legislative history and the holdings of the Courts of Appeal for the Ninth and Tenth Circuits in their analysis of the game Megamania cited above.

The Commission now believes that its 1992 definition of ''game similar to bingo'' is flawed. 25 CFR 502.9. It defies logic to conclude that the Congress intended to require that these other ''similar'' games satisfy the same statutory requirements of bingo. If this were Congress' intent, there would have been no need for the phrase ''and other games similar to bingo.'' These games would not in effect be ''similar'' to bingo; they *would* be bingo.

The definition announced today corrects this flaw by accurately stating that ''other 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. The Commission believes that this modification more accurately reflects Congress' intent with regard to games similar to bingo.

Miscellaneous Comments

One commenter suggests that the proposed rule is unconstitutional either because tribes have vested constitutional property rights in gaming or because the rule is vague and ambiguous. The Commission respects tribal rights to conduct gaming. It has assumed responsibility for modifying the regulations to assist tribal governments in the regulation of gaming and to clarify standards to be applied in the classification decisions required of tribes and the Commission.

One commenter suggests that the Commission unduly burdened the tribes by requiring changes to its classification of games and by failing to consult with tribes. Throughout this regulatory process, the Commission made every effort to reflect existing court decisions. Tribes that adhere to the law as interpreted by the courts will not be changing their approach to game classification as a result of these regulations. Furthermore, two extensive comment periods and issuance of a second change to the proposed definitions reflect the efforts of the Commission to consult and coordinate with tribal governments.

Many commenters offered specific language urging adoption by the Commission. The Commission found this language extremely helpful in the revision process and encourages similar comments in the future. The analysis and rationale underlying these proposals were of high analytical quality, particularly in light of the complexities presented by these issues.

Today's revisions reflect in principle the themes common to many of the comments.

Regulatory Matters

Regulatory Flexibility Act

This regulation merely codifies existing Federal court decisions and assures that the Commission will follow such decisions. Therefore, we do not expect the regulation to have a significant impact on the approximately 315 tribal gaming operations nationwide. Furthermore, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act. To the extent that tribal gaming operations may be considered small businesses and therefore small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, this rule will not have a significant economic effect on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

This 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.

Unfunded Mandates Reform Act

The Commission is an independent regulatory agency and, as such, is not subject to the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, the Commission has determined that this 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 rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. Instead, the rule is likely to decrease litigation with Indian tribes and reduce unnecessary friction between the Department of Justice and the Commission.

Paperwork Reduction Act

This regulation does not require an information collection under the Paperwork Reduction Act 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The Commission has analyzed this rule in accordance with the criteria of the National Environmental Policy Act. This rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental assessment is not required.

List of Subjects in 25 CFR Part 502

Gaming, Indian lands.

For the reasons set forth in the preamble, the National Indian Gaming Commission amends 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. 2701 et seq.

2. Revise § 502.7 to read as follows:

§ 502.7 Electronic, computer or other technologic aid.

(a) *Electronic, computer or other technologic aid* means any machine or device that:

(1) Assists a player or the playing of a game;

(2) Is not an electronic or electromechanical facsimile; and

(3) Is operated in accordance with applicable Federal communications law.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

(1) Broaden the participation levels in a common game;

(2) Facilitate communication between and among gaming sites; or

(3) Allow a player to play a game with or against other players rather than with or against a machine.

(c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

3. Revise § 502.8 to read as follows:

§ 502.8 Electronic or electromechanical facsimile.

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

4. 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 USC 2703(7)(A)(i)) 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.

Dated: June 10, 2002.

Elizabeth L. Homer,

Vice Chair.

Teresa E. Poust,

Commissioner.

Note: The following attachment will not appear in the Code of Federal Regulations.

I respectfully dissent from the views of the majority. My reasons are set forth below:

In summary, my vote against changing the definition of facsimile and technological aid reflects my belief, and my agreement with Judge Lamberth of the United States District Court for the District of Columbia, that the definition of facsimile which the Commission chose in its initial rulemaking in 1992 was the only definition possible in order to implement Congress' explicit intent, as expressed in IGRA.

1. Background

The Indian Gaming Regulatory Act (IGRA, or the Act), enacted on October 17, 1988, and now codified at 25 U.S.C. 2701, *et seq,* created a comprehensive scheme for regulating all gaming on Indian lands. The Act establishes three classes of games—

''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 regulate Class I exclusively.

''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. 25 U.S.C. 2703(7)(A). Under the Act, the term ''class II gaming'' does not include any banking card games or *electronic or electromechanical facsimiles of any game of chance* or slot machines of any kind. 25 U.S.C. 2703(7)(B). Class II gaming thus includes high stakes bingo and pull-tabs as well as non-banking card games such as poker. Indian tribes and the NIGC share regulatory authority over Class II gaming.

''Class III gaming'' means 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 and roulette, and banking card games, such as blackjack. A tribe may engage in Class III gaming if it obtains a compact with the state in which the tribe's lands are located.[1] Under a compact, both the states and Indian tribes possess regulatory authority over Class III gaming. The NIGC retains an oversight role. In addition, the United States Department of Justice and United States Attorneys possess exclusive criminal jurisdiction over Class III gaming on Indian lands and also possess certain civil jurisdiction over such gaming.

As a legal matter, Congress defined the parameters for the gaming classifications when it enacted the 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. Soon after becoming operational in 1992, the Commission issued a final rule defining certain terms not defined by Congress and clarifying or restating existing definitions consistent with congressional intent. 57 FR 12382. Included among the definitions promulgated by the Commission were definitions for two terms pivotal to an understanding of the distinction in gaming classifications. The first was a definition for the term ''electronic, computer or other technologic aid'' which was defined as ''a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used—(a) Is not a game of chance but merely assists a player or the playing of a game; (b) is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and (c) is operated according to applicable Federal communications law.'' 25 CFR 502.7. The second was a definition for the term ''electronic or electromechanical facsimile'' which the Commission defined to mean ''any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3)'' (the Johnson Act). 25 CFR 502.8.

The Commission thus defined the term ''electronic or electromechanical facsimile'' by incorporating, in part, the definition for ''gambling device'' from the Gambling Devices Act, 15 U.S.C. 1171, *et seq,* also referred to as the Johnson Act.[2]

2. Change to the Definition Established by the Commission in 1992 Is Not Appropriate.

Linking the definitions for the term ''electronic or electromechanical facsimile'' with the definition for a Johnson Act gambling device, and also indirectly with the definition of what could constitute a ''technological aid'' permitted for class II gaming, was the product of careful analysis by the Commission of Congressional intent behind the enactment of IGRA and the application by the Commission of a bedrock requirement in rulemaking by a Federal agency not to depart from Congressional intent where the intent has been clearly expressed. Consider the comment of Judge Lamberth of the United States District Court for the District of Columbia in his opinion regarding the NIGC's rulemaking:

Under the [Administrative Procedures Act] APA, a court reviewing an agency's legislative rule-making must first examine the statute and determine whether Congress has unambiguously expressed its intent. *Chevron, U.S.A.* v *National Resources Defense Council,* 467 U.S. 837, 842–43, 104 S.Ct. 2778, 2781–82, 81 L.Ed.2d 694 (1984). *If Congress has been unambiguous, neither the agency nor the court may diverge from that intent. Such is the case here.* (Italics supplied.)

Cabazon Band v. *NIGC,* 827 F.Supp 26 (DC 1993).

The concepts supporting the Commission's initial rulemaking are as valid today as they were in 1992 when the first Commission members adopted the definition. As such, I do not consider it to be the prerogative of the Commission simply to set aside the rule. Rule change would be appropriate under either of the following circumstances: (1) The Congress indicates through legislation that the definition should be deleted or revised, thus manifesting a different Congressional intent, or (2) the Federal courts invalidate the current rule. Neither of these circumstances presently exists.

As to the first point, bills to amend the IGRA have been introduced in several sessions of the Congress since IGRA was enacted in 1988. Although the Congress has made minor adjustment to the Act in the intervening years, it has not chosen to amend the Act's basic content or the game classification structure which is a prominent feature of the Act. As to the second point, at least one Federal court has upheld the rule and no court has repudiated the rule.

3. The Current Definition Manifests Congressional Intent

In adopting the definitional regulations, including 25 U.S.C. 507.8, the Commission ''determined that regardless of features, gaming machines that fell within the *scope* of the Johnson Act were class III games.'' 57 FR 12385. In the view of the Commission, the relationship between the Johnson Act and the IGRA was key to interpreting Congress' intent concerning which gaming-related technology is class II and which is class III. In the preamble to the final rule, the foundation for the Commission's view was said to rest on two points: (1) The Johnson Act prohibits the use of gambling devices in Indian Country (15 U.S.C. 1175); and (2) the IGRA does not supersede or repeal the Johnson Act except with respect to class III gaming conducted under a compact negotiated between a state and a tribe. 57 FR 12385.

IGRA mentions the Johnson Act in two places. First, at 25 U.S.C. 2710(d)(6), the IGRA indicates that the Johnson Act will not apply to compacted gaming. Second, at 25 U.S.C. 2710(b)(1)(A), the IGRA indirectly mentions the Johnson Act by indicating that a tribe may conduct class II gaming if the State permits such gaming by any person, organization or entity, and ''such gaming is not otherwise specifically prohibited on Indian lands by Federal law.''

In the Senate Report that accompanied the passage of the IGRA, the Select Committee on Indian Affairs explained the meaning of the phrase ''such gaming is not otherwise prohibited on Indian lands by Federal law'' as referring to ''gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo or lotto.'' S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988).[3]

The relevance of the Johnson Act to determining the classification of Indian gaming permitted under the IGRA, and consequently the validity of the Commission's choice in 1992 to incorporate the current definition of electronic or electromechanical facsimile, is bolstered by the legislative history of IGRA. In a colloquy that appears in the Congressional Record, Senator Inouye confirmed Senator Reid's understanding that the waiver from the Johnson Act created by IGRA was limited to gaming conducted under tribal-state compacts. In response to a statement of Senator Reid's understanding that the waiver from the Johnson Act is limited to gaming conducted under tribal-state compacts, Senator Inouye states:

Yes the Senator is correct. The bill as reported by the committee would not alter the effect of the Johnson Act except to provide for a wavier of its application in the case of gambling devices operated pursuant to a compact with the State in which the tribe is located. The bill is not intended to amend or otherwise alter the Johnson Act in any way.

134 Cong. Rec. 12650, September 15, 1988.

Thus, the Johnson Act is significant to understanding the distinction Congress intended between class II and class III gaming. The Johnson Act applies except in compacted class III gaming and therefore would apply to class II gaming. The Commission ensures this application in its regulations by use of the definition for ''electronic or electromechanical facsimile'' which incorporates the Johnson Act definition of gambling device. Removing the

[1] For a compact to be effective, the approval of the Secretary of the Interior of the compact terms must be obtained. In the absence of a compact, a tribe may operate class III gaming under gaming procedures issued by the Secretary of the Interior.

[2] The Johnson Act, codified at 15 U.S.C. 1171–1178, contains a definition for ''gambling device'' that includes in pertinent part ''(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or (3) any subassembly or essential part intended to be in connection with such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.''

[3] According to the Commission's analysis of the Senate Report, the language in the report concerning devices used in connection with bingo or lotto does not create an exception to the Johnson Act but characterizes the *scope* of the Johnson Act, which is to say that the language in the Senate Report merely states the Committee's view that the Johnson Act does not prohibit bingo blowers—they are not within its scope.

definition can signal a departure from Congressional intent.

4. Federal Courts Support the Commission's Determination Regarding the Definition

The crucial challenge to the Commission's early rulemaking came shortly after the Commission adopted its final rules. In *Cabazon Band* v. *NIGC,* 827 F.Supp 26 (DC 1993), eight tribes joined in a challenge to several of the Commission's rules including the definition for ''electronic or electromechanical facsimile'' at 25 CFR 502.8. Judge Lamberth observed:

[I]f the definition of facsimiles were less broad than that of gambling device, IGRA would be internally contradictory: technology that—ostensibly—now would be allowed for class II gaming under 25 U.S.C. 2703(7)(A) would be prohibited by the Johnson Act (since the repeal of the Johnson Act is only for class III gaming). Thus, only a definition of facsimile that is equivalent to that of gaming device renders the statute internally consistent and allows both statutes peaceably to coexist.

Plaintiff's main objection to the Commission's definition stems from their perception that the definition of gambling device sweeps within its ambit any device that might be used in gambling. This interpretation of the Johnson Act is incorrect. As several cases have held, Congress has acknowledged, and the Commission has noted in the preamble to its rules, the Johnson Act applies only to slot machines and similar devices (including the pull-tab games here in issue), not to aids to gambling (such as bingo blowers and the like). When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiff's fear. Moreover, it is clear that Congress' intent in IGRA is fulfilled only when the IGRA's definition of facsimile adopts the Johnson Act's definition of gambling device.

Cabazon Band v. *NIGC,* 827 F.Supp. at 31. This case represents the only serious court challenge that has been brought against the Commission's rulemaking and its determination of appropriate definitions. On appeal, the plaintiff tribes dropped their challenge to the Commission rules and instead focused only on their request, denied in the District Court, for a declaratory judgment that certain video pull-tab games were class II. In reciting the history of the case in its appellate decision, the United States Court of Appeals for the District of Columbia noted ''Judge Lamberth's cogent opinion rejected each of the Tribe's arguments against these regulations as 'either moot or meritless.''' *Cabazon Band* v. *NIGC,* 14 F.3d 633, 634 (1994). (The Court of Appeals also upheld the ruling of Judge Lamberth that the video pull-tab games were class III.)

5. Conclusion

The Commission's action raises concerns about the separation of powers between an executive branch agency and Congress, and I am not therefore convinced that the rule change is an appropriate action for the Commission. True, as the proponents indicate, courts have found it convenient to use the common dictionary meaning of the term ''facsimile'' in deciding whether a particular video pull-tab game falls within the statutory definition for class II gaming. Also true, but not particularly understandable, the Court of Appeals for the District of Columbia, the same Court that six years earlier found Judge Lamberth's *Cabazon* opinion on the rule ''cogent,'' did indicate that the Commission's rule provided no assistance in interpreting the statute. (*See Diamond Games* v. *Reno,* 230 F.3d 365, 369 (D.C. Cir 2000)). However, that Court did not indicate in any way that the definitional rule varied from the IGRA or from Congressional intent.

It is the role of Congress to write the law and it is this Commission's responsibility faithfully to execute the law that Congress has passed. If the Congress through legislative enactment signals its desire to change the gaming classification structure under the IGRA, with the laudable result of permitting a wider range of class II games, or somehow moves the line between what is a technological aid permitted for the play of class II games and what is an electronic facsimile of a game of chance precluded from being considered class II, then I would be first-in-line to modify the original definition of facsimile. I am concerned though that the Commission's action today represents a revision of the law that Congress has created and improperly encroaches upon the legislative function. For now, therefore, I feel bound to dissent in the Commission's amendment because, according to the only relevant court decision on the matter, the original definition clearly manifests explicit Congressional intent and is the only definition that can do so.

Dated: June 8, 2002.

Montie R. Deer.

[FR Doc. 02–15035 Filed 6–14–02; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD07–02–061]

Drawbridge Operation Regulations; Hatchett Creek (US 41), Gulf Intracoastal Waterway, Venice, Sarasota County, FL

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Seventh Coast Guard District, has approved a deviation from the regulations governing the operation of the new Hatchett Creek (US 41) bridge across the Gulf Intracoastal Waterway in Venice, Florida. This deviation allows the drawbridge owner to only open one leaf of the bridge from June 10, 2002 until July 31, 2002 to complete construction of the new bascule leaves.

DATES: This deviation is effective from 6 a.m. on June 10, 2002 until 6 p.m. on July 31, 2002.

ADDRESSES: Material received from the public, as well as comments indicated in this preamble as being available in the docket, are part of docket [CGD07–02–061] and are available for inspection or copying at Commander (obr), Seventh Coast Guard District, 909 SE 1st Avenue, Room 432, Miami, FL 33131 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Barry Dragon, Chief, Operations Section, Seventh Coast Guard District, Bridge Branch at (305) 415–6743.

SUPPLEMENTARY INFORMATION: The Florida Department of Transportation requested that the Coast Guard temporarily allow the Hatchett Creek bridge to only open a single leaf of the bridge from June 10, 2002 until July 31, 2002. This temporary deviation from the existing bridge regulations is necessary to complete construction of the new bascule leaves. The Hatchett Creek (US 41), bridge has a horizontal clearance of 30 feet between the fender and the down span.

The District Commander has granted a temporary deviation from the operating requirements listed in 33 CFR 117.5 to allow the owner to complete construction of the new bascule leaves. Under this deviation, the Hatchett Creek (US 41) bridge need only open a single leaf of the bridge from June 10, 2002 until July 31, 2002.

Dated: June 9, 2002.

Greg Shapley,

Chief, Bridge Administration, Seventh Coast Guard District.

[FR Doc. 02–15200 Filed 6–14–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD07–02–062]

Drawbridge Operation Regulations; Atlantic Avenue Bridge (SR 806), Atlantic Intracoastal Waterway, Mile 1039.6, Delray Beach, FL

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Seventh Coast Guard District, has approved a