



Texas Lottery Commission

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William L. Atkins
Director

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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION

The Honorable John Cornyn
Attorney General of Texas
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MAY 17 2001

Dear General Cornyn:

OPINION COMMITTEE

This is a request for an Attorney General's Opinion regarding the application and meaning of Chapter 2001 of the Texas Occupations Code in connection with the Texas Lottery Commission Charitable Bingo Operations Division's duty to exercise strict control and close supervision over Bingo conducted in this state. Specially, this opinion involves the device known as a "bingo card-minding device", which is equipped with an additional software feature that allows a bingo player to access additional non-bingo games. The issues presented generally involve the powers of the Texas Lottery Commission Charitable Bingo Operations Division and whether the authority to regulate the game of bingo extends to the discretion to approve or not approve secondary components or features unrelated to the game of bingo when represented to be part of the functionality of a electronic bingo card-minding device. No litigation is pending in this matter.

FACTUAL BACKGROUND

A "bingo card-minding device" is generally defined as an electronic or computerized device that allows a bingo player to store, display and mark a bingo card face¹. In other words, for a fee, this computer device allows a player to electronically track the bingo numbers drawn and to mark their cards by electronic means.

GameTech International ("GameTech") is a currently licensed bingo equipment manufacturer. GameTech is a manufacturer of a product generically known as a "bingo card-minding device".

¹ 16 TEX.ADM.CODE. § 402.541 defines a "card-minding device" as "any mechanical, electronic, electromechanical or computerized device, and including related hardware and software, that is interfaced with or connected to equipment used to conduct a game of bingo and which allows a player to store, display, and mark a bingo card face five (5) spaces wide by five (5) spaces long, the center space free, and the other spaces containing pre-printed numbers between 1 and 75, inclusive. A card-minding device shall not be a video lottery machine as defined by Section 10 of HB 3021, 74th Legislature, Acts 1995.

On October 30, 2000, GameTech submitted for testing and approval, as it is required to do by administrative rule, a specific type of device: the "Diamond Too". The Diamond Too device contains software that is designed to be installed in an electronic bingo card-minding device so that a bingo player, in addition to using the bingo card minding device to keep track of multiple bingo cards, can also access software games.

In addition to the fee paid to use the electronic bingo-card minding device, for an extra fee, known as "supersizing", additional software can be activated to provide games to the bingo player.² These additional games may include different versions of solitaire, pegs (a game using golf tees and a triangular block of wood with holes for the tees), puzzles (pictures that are broken in puzzle pieces and reassembled), and video poker. As to these games except video poker, it is unknown whether starting credits are awarded or accumulated. It is also not known whether these games allow for the adjustment of winnings.

The video poker games use a video playing screen that displays five dealt cards, any of which can be held for a second deal. The video poker games allow a bet ranging from one credit to the maximum credit of five. These credits are referred to as "coins" on the winning hand chart at the top of the play screen. The chart displays the winning amount of the hand, flush, strait, three of a kind, etc. based on how many coins were bet. When playing the video poker games, the screen shows a starting credit amount of five hundred coins and offers two versions of poker, "Jacks or Better" and "Deuces Wild". In connection with the video poker games, credits can be accumulated. It is not known whether either video poker game allows for the adjustment of winnings.

The device housing the electronic bingo card-minding device and the additional games, including the video poker game, does not have a port allowing for the insertion of money or tokens or for the dispensing of tickets, gift certificates, or tokens.

LEGAL AUTHORITIES

CHARITABLE BINGO OPERATIONS REGULATORY AUTHORITY

The Texas Lottery Commission Charitable Bingo Operations Division ("CBOD") has authority to regulate bingo and is directed to "*exercise strict control and close supervision over all bingo conducted* in this state so that bingo is fairly conducted and the proceeds derived from bingo are used for an authorized purpose", (emphasis added) Bingo Enabling Act (hereafter the "BEA"), TEX. OCC. CODE § 2001.051(b).

² It is unknown whether there is a different fee for packs containing some or all of the additional games, or further whether the packs are sold in different dollar denominations.

ELECTRONIC BINGO CARD-MINDING DEVICES

The BEA authorizes electronic bingo card-minding devices with certain limitations. The limitations are enumerated in section 2001.409 of the BEA, which states:

- (a) a person may not use a card-minding device:
 - (1) to generate or determine the random letters, numbers, or other symbols used in playing the bingo card played with the device's assistance;
 - (2) as a receptacle for the deposit of tokens or money in payment for playing the bingo card played with the device's assistance; or
 - (3) as a dispenser for the payment of a bingo prize, including coins, paper currency, or a thing of value for the bingo card played with the device's assistance.
- (b) Not more than 40 percent of the individuals attending a bingo occasion, based on the average of two previously submitted quarterly reports, may use electronic or mechanical card-minding devices. This subsection does not apply to pull-tab bingo.

The Commission, by rule, has required manufacturers of electronic bingo card-minding devices to submit an identical prototype of all bingo card-minding devices for approval prior to being sold, leased, or otherwise provided. Charitable Bingo Administrative Rules, 16 TEX. ADM. CODE § 402.555 provides that:

- (b) Approval of Card-minding Devices.
 - (1) No card-minding device may be sold, leased, or otherwise furnished to any person in this state or used in the conduct of bingo for public play unless and until a card-minding device which is identical to the card-minding device intended to be sold, leased, or otherwise furnished has first been presented to the commission by its manufacturer, at the manufacturer's expense, and has been approved by the commission for use within the state.
 - (2) An identical card-minding device to the card-minding device intended to be sold, leased, or otherwise furnished must be presented to the commission in Austin for review. If granted, approval extends only to the specific card-minding device approved. Any modification must be approved by the commission.

* * *

- (5) If the commission detects or discovers any problem with the card-minding device that affects the *security and/or integrity of the bingo game or card-minding device* (emphasis added), the commission may

direct the manufacturer, distributor, or conductor to cease the sale, lease, or use of the card-minding device, as applicable. The commission may require the manufacturer to correct the problem or recall the card-minding device immediately upon notification by the commission to the manufacturer. If the manufacturer, distributor, or conductor detects or discovers any defect, malfunction, or problem with the card-minding device, the manufacturer, distributor, or conductor, as applicable, shall immediately remove the card-minding device from use or play and immediately notify the commission of such action.

“GAMBLING DEVICE” AS DEFINED BY THE TEXAS PENAL CODE

TEX. PENAL CODE ANN. § 47.01 provides guidance on the issue of what constitutes a “gambling device”. TEX. PENAL CODE ANN. §47.01 defines a gambling device as:

(4) "Gambling device" means any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.

* * *

(9) "Thing of value" means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

The definition of a "gambling device" contained in section 47.01(A) of the Penal Code, includes electronic games that operate by chance if as a result of the play or operation of the game, the game awards credits or free games, records the number of free games or credits, and records the removal or cancellation of free games or credits. While the term "amusement machine" is not defined in the Penal Code, it is inferred that bona fide amusement contrivances are those devices which reward the player with non-cash merchandise prizes, toys, or novelties, with a maximum \$5.00 prize limit.

Consequently, under current Texas law, in order to meet the criteria as a gambling device there must be three things present:

- (1) consideration;
- (2) an opportunity to obtain anything of value; and
- (3) a prize awarded solely or partially by chance which can include game award credits or free games and which can include the recordation of the number of free games or credits so awarded and the cancellation or removal of the free games or credits.

Finally, if a device meets the definition of a "gambling device", then TEX. PENAL CODE ANN. § 47.06 makes it a *Class A Misdemeanor* to possess such a device with the intent to further gambling. TEX. PENAL CODE ANN. § 47.06 states:

- (a) A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers, or possesses any gambling device that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of a gambling device.

"GAMBLING DEVICE" AS MENTIONED IN THE BINGO ENABLING ACT

Likewise, section 2001.416 of the BEA provides:

- (a) A game of chance other than bingo or a raffle conducted under Chapter 2002 may not be conducted or allowed during a bingo occasion.

* * *

- (d) This section does not prohibit the exhibition and play of an amusement machine that is not a gambling device as defined by Section 47.01, Penal Code.

Like the Penal Code, "amusement machine" is not defined the BEA.

Finally, another provision of Texas law, is HB 3021 §10 (Act of June 17, 1995, HB 3021, §10, 74th Leg., R. S.).³ The effect of HB 3021, §10 is to prohibit a cash insertion electronic video machine, which dispenses free games or credits redeemable or payable by or for cash coins or tokens.⁴ Although HB 3021, §10 refers to the term “electronic video machine”, it is not thought to be applicable to this fact situation because, as the Commission understands, the electronic card minding device containing the video poker software, is not capable of the insertion of cash for free games or credits redeemable for cash or tokens.

OTHER “GAME OF CHANCE” AS REFERENCE IN THE BINGO ENABLING ACT

A separate question may be that section 2001.416(a) of the BEA, provides a separate and distinct prohibition against other games of chance, which may be broader than the prohibition against gambling devices as stated in section 2001.416(d) of the BEA. Specifically, section 2001.416(a) of the BEA provides that “games of chance other than bingo or a raffle” may not be conducted or allowed during a bingo occasion. Section 2001.416(d) of the BEA further provides that the section does not prohibit the “exhibition and play of an amusement machine that is not a gambling device as defined by section 47.01, Penal Code”.

Section 2001.002 of the BEA defines a “bingo occasion” as “all activities incident to the conduct of a series of bingo games by a licensed authorized organization including the organization’s licensed times and any preparatory or concluding activities incident to the conduct of bingo”. Attorney General Opinion No. JM-844 has interpreted “bingo occasion” to consist of times before, during, between, and after bingo games. Thus, an electronic card-minding device, which enables a bingo player to mark a bingo card face electronically, can be understood to be and is in use during a “bingo occasion”.

Next, consideration is given to the term “game of chance”. The term “game of chance” is not specifically defined in the BEA except it is included as part of the definition of “bingo” or “game” in § 2001.002 (5)⁵. The Houston Court of Appeals, in State v. Gambling Device, 859

³ While not included in the recodification of the Bingo Enabling Act into the Occupation Code, HB 3021, §10 was not repealed (unlike Article 179d, Vernon’s Texas Civil Statutes) and still exists in the General and Special Laws of Texas, 74th Legislature, Regular Session, 1995.

⁴ HB 3021, §10 (Act of June 17, 1995, HB 3021, §10, 74th Leg., R. S.), provides “Nothing in this Act shall be construed as authorizing any game using a video lottery machine or machines. In this section “video lottery machine” or “machine” means any electronic video game machine that, upon insertion of cash, is available to play or simulate the play of a video game, including but not limited video poker, keno, and blackjack, utilizing a video display and microprocessor in which the player may receive free games or credits that can be redeemed for cash, coins, or tokens or that directly dispenses cash, coins, or tokens”.

⁵ Section 2001.002(4) provides “Bingo’ or ‘game’ means, except as provided by Section 2001.551, a specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designed numbers or symbols conforming to randomly selected numbers or symbols”.

S.W.2d 519 (Tex.App.-Hous. [1 Dist.] 1993), discussed at length the meaning of “chance” in the context of a game of “bulldozer” which is within a category of amusement games known as “pusher machines” or “penny falls”. The question addressed was whether the definition of a “gambling device” which included the phrase “the award of which is determined by chance, even though accompanied by some skill” was unconstitutionally vague because there was no specificity on the degree of chance and skill required. The court determined that the degree of skill and chance did not have to be specifically delineated, so long as some degree of chance was involved. Thus, the outcome is determined by chance when a player through the exercise of skill alone cannot control the outcome of any game.

The video poker games included in the bingo card-minding devices, has the same element of chance in other poker games, but for the computer generated optics. The outcome of any one hand is a mixture of skill and chance in that the skillful player will know which cards to keep and which to discard.

Notwithstanding that a video poker game may be a “game” and involve some “chance”, the issue remains whether the bingo card-minding devices containing the video poker game must award prizes to constitute a “game of chance” within the context of the BEA. The Commission can not find any authority on point. In State v. Gambling Device, *id.* at 524, the court cited the oft-repeated rule that “gambling activities are, traditionally, those activities that involve the elements of consideration, chance, and profit”. Therefore, even though the electronic bingo card-minding device containing the video poker game, as presented in these facts, does not award any prizes, the question remains whether it is included in the “other game of chance” prohibition of the BEA.

QUESTIONS PRESENTED

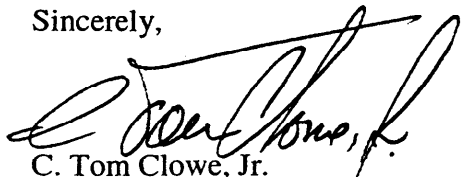
Specifically, the Commission’s questions are as follows:

- (1) Does the Charitable Bingo Operations Division’s statutory responsibility to regulate bingo extend to the allowance or disallowance of the installation of additional software on an electronic card-minding device, such as the installation of a video poker game, when such software is not related to the game of bingo?
- (2) Is the proposed video poker game included as part of the additional software on the electronic card-minding device, a device that is included in the definition of a “gambling device” within the meaning of the Texas Penal Code and/or the Bingo Enabling Act and is not otherwise subject to the “amusement device” exception? If so, then what effect does this determination have on the authority of the Charitable Bingo Operations Division to regulate bingo?

- (3) Notwithstanding the provisions of the Texas Penal Code and/or the Bingo Enabling Act regarding gambling devices or video lottery machines, does the proposed video poker game included as part of the additional software on the electronic bingo card-minding device, constitute another "game of chance" and therefore come within the prohibition found in the Bingo Enabling Act, section 2001.416?

Thank you in advance for your thoughts and consideration in this matter. Please contact the Commission's General Counsel, Kimberly L. Kiplin, at 512.344.5105 should you have any questions.

Sincerely,



C. Tom Clowe, Jr.
Chair, Texas Lottery Commission

cc: Commissioner Betsy Whitaker
Commissioner Walter H. Criner
Billy Atkins, Director, Charitable Bingo Operations Division