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| BAO 2004-0511-00014 | Date Issued: 07/12/2004 | View Request <a href="#">RQ 2004-0511-00014</a> |
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| Summary: | 16 TAC 402.555 relating to card-minding systems applies prospectively to systems submitted to the Commission for approval on or after August 26, 2003. However, any modification to a prior approved card-minding device would require the review and approval of the Commission based on the standards provided in 16 TAC 402.555 prior to use in Texas. |
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**CERTIFIED MAIL NO. 7001 2510 0002 0891 7692  
RETURN RECEIPT REQUESTED**

BAO # 2004-0511-00014

July 12, 2004

Mr. Tres Gray  
Trend Gaming Systems, LLC  
8868 Research Boulevard, Suite 500  
Austin, Texas 78758

*via certified mail*

Re: Request for Advisory Opinion concerning the implementation of recently enacted rules governing electronic bingo systems

Dear Mr. Gray:

The Texas Lottery Commission (the "Commission") received your request for an advisory opinion regarding the implementation of recently enacted rules governing electronic bingo systems.

Below are the issues identified in your email followed by the Commission's response.

This is a request for an advisory opinion concerning the implementation of recently enacted rules governing electronic bingo systems. The current rules regulating electronic bingo require that the systems meet certain criteria to be approved for use in the state of Texas. New rules were enacted that were substantially different than previous electronic bingo system requirements. These new rules resulted in manufacturers having to reprogram and redesign their electronic bingo systems to meet the new criteria. Several manufacturers have resubmitted their products and received approval of their new electronic bingo systems from the Texas Lottery Commission.

The question now arises as to the timing of the implementation of the new approved electronic bingo systems. The previously approved electronic bingo systems no longer comply with the regulations outlined in the Charitable Bingo Administrative Rules, yet these systems are still being used. Many of the new rules relating to electronic bingo systems were devised due to a problem with a manufacturer's product allowing players to obtain fraudulent bingos. This equipment is still being utilized even though the specific

manufacturer has had a new complying system approved. Obviously the new rules were adopted to protect the public interest against fraud, yet equipment is being utilized that does not meet the standard set by the Texas Lottery Commission in protecting those interests.

The advisory opinion I am seeking is in what time frame a manufacturer is required to replace non-complying equipment.

There is also a question relating to the Distributor's role in implementing the new bingo systems. Once a manufacturer has a new complying system approved, is the Distributor in a position of distributing an unapproved system should the non-complying bingo systems remain in use and what would the Distributor and Manufacturer's liability be in supplying and/or distributing unapproved products in Texas.

In your request for advisory opinion, you inquire about the requirements and conditions imposed on manufacturers and distributors with regard to the "rules governing electronic bingo systems." The Commission has not promulgated rules relating to electronic bingo systems. However, the Commission has promulgated rule 16 TAC 402.555 relating to card-minding devices. The questions posed in your request for advisory opinion will be answered in the context of 16 TAC 402.555.

#### ANSWER:

On August 5, 2003, the Commission voted to adopt new administrative rule 16 TAC 402.555 (the "rule"). The rule became effective on August 26, 2003<sup>[\[1\]](#)</sup>, and replaced the previous version of the rule which was repealed. A copy of the new rule is attached for your review.

In your request for advisory opinion, you state that you are seeking an advisory opinion regarding, "...what time frame a manufacturer is required to replace non-complying equipment." Subsection (b) of the rule provides in pertinent part:

#### (b) Approval of Card-Minding System Components.

(1) Proprietary software may not be sold, leased, or otherwise furnished, including demonstrated except as provided by subsection (i)(5) of this section, to any person in this state, for use in the conduct of bingo until a card-minding system containing the identical software 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) A portable card-minding device may not be sold, leased, or otherwise furnished, including demonstrated except as provided by subsection (i)(5) of this section, to any person in this state, for use in the conduct of bingo until a portable 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.

Thus, except for approved demonstrations, unapproved card-minding system components may not be sold, leased, or otherwise furnished in Texas. However, the rule does not establish a time frame in which the manufacturer of a previously approved card-minding device is required to replace it with a new device in the Texas market. Neither does the rule require a manufacturer to withdraw from the Texas marketplace those card-minding devices which have been previously approved by the Commission, so long as the device has not been modified or changed subsequent to its approval.

Generally, there is a presumption that a statute will be applied prospectively<sup>[2]</sup> instead of retroactively unless it can be ascertained from the plain language of the statute that the legislature intended the law to apply retroactively.<sup>[3]</sup> This presumption is provided for in Texas Government Code, §311.022 which states in pertinent part,

**“A statute is presumed to be prospective in its operation unless expressly made retroactive.”**

Thus, most statutes are applied prospectively because the plain language of the statute does not indicate otherwise. Likewise, this rule of construction regarding the prospective application of statutes applies to rules and regulations with equal force.<sup>[4]</sup> Any determination as to the applicability of an administrative rule must come from the plain language of the rule. After reviewing the rule at issue, there is no express statement of retroactive applicability. Thus, the new rule applies prospectively.

Any modification to an approved device must be resubmitted for further approval. Subparagraph (b)(2) of the old card-minding rule provided in pertinent part that, “[a]ny modification must be approved by the commission.” Thus, although a manufacturer obtains approval of a device, any modifications or changes to the device to incorporate advanced technology must be re-submitted for Commission approval. The new card minding rule provides for procedures in evaluating and approving technological advancements in card-minding systems. If a bingo licensee wants to use a previously approved card minding device, they are allowed to do so as long as the device was approved by the Commission and no subsequent modifications were made. If modifications or changes are made to an approved device, the manufacturer must then re-submit the components for testing and approval in accordance with the new rule.

With regard to your inquiry concerning the distributor’s role in implementing the standards provided in the new rule, a distributor should never be put in the position of distributing an unapproved system in Texas. However, as indicated above, the fact that a card-minding device was approved for use in Texas by the Commission prior to the effective date of the new rule does not automatically make that card-minding device non-compliant or unapproved. Subsection (e) of the new rule outlines the requirements placed on the distributors of card-minding systems in Texas.

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## SUMMARY

16 TAC 402.555 relating to card-minding systems applies prospectively to systems submitted to the Commission for approval on or after August 26, 2003. However, any modification to a prior approved card-minding device would require the review and approval of the Commission based on the standards provided in 16 TAC 402.555 prior to use in Texas.

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This advisory opinion cannot be construed as a tax ruling or otherwise interpretive of the Internal Revenue Code. The information provided is completely limited to the context of the Bingo Enabling Act and the Charitable Bingo Administrative Rules.

This advisory opinion is based on the laws, rules and regulations in effect at the time of its issuance. All of the information provided herein is subject to change in law.

This opinion is purely advisory in nature and is limited to the particular questions at issue and to the facts presented in the request. Therefore, this opinion must not be relied upon as a previous determination regarding any conduct which is not substantially consistent with the opinions and facts stated in the request.

Yours truly,

William L. Atkins, Director  
Charitable Bingo Operations Division

cc: C. Tom Clowe, Jr., Chairman  
James A. Cox, Jr., Commissioner  
Rolando Olvera, Commissioner  
Kimberly L. Kiplin, General Counsel

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<sup>[1]</sup> Links to applicable statutes and Commission promulgated administrative rules may be viewed by accessing the Commission webpage at [www.txlottery.org](http://www.txlottery.org).

<sup>[2]</sup> See Texas Constitution, Article I section 16, "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

<sup>[3]</sup> See *Hicks v. Humble Oil and Refining Company*, 970 S.W.2d 90, 94 (Tex.Civ.App.-Houston [14<sup>th</sup> Dist.] 1998, *pet. denied*). See also *Ex parte Abell*, 613 S.W.2d 255 (Tex. 1981).

<sup>[4]</sup> *Id.* at 94.