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TEXAS LOTTERY COMMISSION

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CERTIFIED MAIL NO. 7004 0750 0001 3238 3159
RETURN RECEIPT REQUESTED

November 12, 2010

Stephen Fenoglio
508 W. 12th Street
Austin, TX 78701-1819

Re: Bingo Advisory Opinion Request No. 2011-0913-0001

Dear Mr. Fenoglio:

This advisory opinion responds to your request for a bingo advisory opinion received on September 13, 2010. You asked twelve questions about compliance of certain card-minding player tracking software with five specific statutory and rule provisions in the Bingo Enabling Act (Act) and the Bingo Administrative Rules (Rules). Following is your description of two card-minding player tracking software scenarios:

Scenario 1:

Several licensed card-minding manufacturers offer player tracking software that collects attendance, spending and personal data from the player. The player tracking software can, and sometimes does, prompt the bingo conductor to offer the player an award when a predetermined level of participation in playing bingo at that location is reached. The award can be discounted bingo packs, tabs, t-shirts, daubers, etc.

Scenario 2:

In addition, the player tracking system can offer players who have registered their session attendance through the card-minding system an opportunity to win prizes. The system may or may not use a series of points, to track a player's attendance. The prizes awarded through the system are not counted against the bingo prize board, but they are something of value. The award of prizes through the system may be determined by a random number generator/program or by a drawing.

QUESTIONS AND ANSWERS

Below are the questions and related law submitted in your request, followed by our responses.

- 16 TAC § 402.302(d)(10)

A manufacturer of a card-minding device shall ensure that the card-minding system does not allow a card-minding device to be used to obtain a bingo prize for any bingo game other than for a game within the bingo occasion for which the card-minding device was sold.

1. What is the definition of a “bingo prize?”

Answer:

Because neither the Act nor the Rules define “bingo prize,” it is appropriate to refer to the common meaning of the term and to consider the context of its use.¹ “Prize” means “something that is won in a lottery or the like.”² The context of use of the term in 16 TAC § 402.302(d)(10) is a bingo occasion. Thus, a bingo prize is something that is awarded as a result of winning a bingo game during a bingo occasion.

2. Would the prizes awarded as described above be considered “within the bingo occasion for which the card-minding device was sold”?

Answer:

In Scenario 1, if the award is given based solely on “when a predetermined level of participation in playing bingo at that location is reached,” the activity would not fall within the definition of a bingo game. Tex. Occ. Code §§ 2001.102(4) and 2001.551(a) provide that “bingo” or “game” means a specific game of chance in which prizes are awarded on the basis of designated numbers or symbols conforming to randomly selected numbers or symbols. Therefore, the award in Scenario 1 would not be for a bingo game and 16 TAC § 402.302(d)(10) would not be applicable. The activity would be considered to be a door prize subject to the \$250 restriction in § 2001.420(c) of the Act.

Scenario 2, which provides for a random number generator or a drawing to determine to whom a prize is awarded, would be a game within the bingo occasion for which the card-minding device was sold. However, Scenario 2 would be a prohibited second game of chance. Section 2001.416 of the Act prohibits a game of chance other than bingo, or a raffle conducted under Tex. Occ. Code ch. 2002, or an amusement machine that is not a gambling device as defined by § 47.01 of the Penal Code. All bingo games must be

¹ See Tex. Atty. Gen. Op. No. GA-0354 (2005)

² prize. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/insert> (accessed: October 20, 2010).

approved by the Commission. *See* Tex. Occ. Code §§ 2001.055, 2001.056, 2001.408, 2001.409, 16 TAC § 402.300(b)(1), and 16 TAC § 402.301(b)(1).

3. Does the fact that a bingo player may receive a prize based, in part, on his attendance at a number of bingo occasions violate this rule?

Answer:

Rule 402.302(d) (10) pertains to “a bingo prize for any bingo game other than for a game within the bingo occasion.” In regard to Scenario 1, the fact that a bingo player may receive a prize based solely on his attendance at a number of bingo occasions does not violate 16 TAC § 402.302(d)(10) because the prize is not awarded for a bingo game.

Scenario 2 contemplates that the award of prizes may be determined by a random number generator/program or by a drawing. Because the Commission has not approved such a bingo game and there is no indication that the game would be conducted in accordance with Tex. Occ. Code ch. 2002, the game would not fall within the scope of Rule 402.302(d)(10). The game would violate Tex. Occ. Code § 2001.416(a) which provides that a “game of chance other than bingo or a raffle conducted under Chapter 2002 may not be conducted or allowed during a bingo occasion.”

4. Would the player tracking prizes described above be considered bingo prizes subject to the prize fees required by the Act?

Answer:

Tex. Occ. Code § 2001.502 provides that a licensed authorized organization shall collect a fee from a person who wins a bingo prize of more than \$5. Because neither of the scenarios provided in your request are bingo games, the player tracking prizes would not be considered bingo prizes subject to the prize fee provision of § 2001.502. In Scenario 1, a prize awarded based solely on attendance would not be subject to the prize fee because it would not be awarded as a result of winning a bingo game. Scenario 2 would be a game of chance prohibited by Tex. Occ. Code § 2001.416(a) unless it is a raffle conducted under Chapter 2002.

5. If the player tracking prizes were awarded before the licensed time for bingo, does that constitute a violation of conducting bingo outside the licensed times?

Answer:

Scenario 1 award of prizes before the licensed bingo time does not constitute a violation of conducting bingo outside the licensed times because it would not be a bingo game as discussed in Answer #2 above. Scenario 2 is not an approved bingo game.

- 16 TAC § 402.302(6)

Player tracking software. Computer software, located on the card-minding system that is used to track characteristics of bingo players, including personal data and purchasing habits of a player at a bingo hall.

6. Does this definition allow for or prohibit the award of prizes triggered by the player tracking software and determined either by a random number generator/program or a drawing? Why or why not?

Answer:

The definition of “player tracking software” in 16 TAC § 402.302(6) does not allow for or prohibit the award of prizes triggered by the player tracking software and determined either by a random number generator/program or a drawing. The definition provides specification of the essential properties of “player tracking software” but does not necessarily provide limitations. However, the award of prizes triggered by the player tracking software and determined either by a random number generator/program or a drawing would be a second game of chance prohibited by § 2001.416 unless conducted in accordance with Tex. Occ. Code ch. 2002.

- 16 TAC § 402.302(d)(7)

A card-minding system may include player tracking software. Records generated by the use of the player tracking software are subject to review by the Commission. The records should be available either at the card-minding system location or retrievable via dial up modem. The records must be maintained for a period of not less than 12 months. Player tracking records shall at all times be the property of the licensed authorized organization and neither the manufacturer nor the distributor shall utilize or make available to any person, other than the Commission or as otherwise authorized by law, the information contained within the player tracking software without the express written permission of the licensed authorized organization.

7. If the above-described system complies with and is regulated by the Bingo Enabling Act and associated Rules, what records (including records regarding prizes, prize winners) should be kept?

Answer:

16 TAC § 402.302(d)(7) requires that all records pertaining to player tracking that are generated by the use of a card-minding system must be maintained for a period of not less than 12 months.

- 16 TAC § 402.302(b)(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.

8. Must portable card-minding systems that offer non bingo prizes or conduct prize redemption be approved by the State of Texas before they may be used?

Answer:

All card-minding systems must be approved by the Commission before they may be used or demonstrated. See 16 TAC § 402.302(c) pertaining to Submission of Card-Minding System Components. “. . . [T]he Commission is necessarily required to examine the additional software on an electronic bingo card-minding device, and disapprove its installation if it allows a player to play a ‘game of chance’ or use a ‘gambling device’ during a bingo occasion.”³ Furthermore, 16 TAC § 402.302(i)(3) provides that the Commission may direct cessation of the sale, lease or use of a card-minding system if the Commission finds any problem with the card-minding system that affects the security or integrity of the bingo game or card-minding system. Moreover, 16 TAC § 402.302(i)(4) provides:

...

If the Commission detects or discovers a card-minding system at a bingo premises that is using components or software that were required to have been approved by the Commission but have not been approved, the card-minding system is deemed to have an unauthorized modification.”

9. Has the State of Texas approved a random number generator for use in conducting bingo? If so, may random number generator software that has been disabled in bingo blowers now be used?

Answer:

The Commission has not approved an electronic or computerized random number generator for use in conducting bingo. Furthermore, the Commission has not approved player tracking software as described in your request to directly or indirectly award prizes to bingo players through a random number generator/program or a drawing.

³ Op. Tex. Att’y Gen. No. JC-0449 (2002)

- HB 3021 74th Legislature

SECTION 10. 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 to 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, coin, or tokens.

10. Because a player has to purchase a card-minding device and may buy additional bingo faces on the floor, do you consider those requirements and capabilities the “insertion of cash”? If so, does awarding players prizes through the system described above make those devices a “video lottery machine”?

Answer:

“Insert” means “1. to put or place in: e.g. to insert a key in a lock.”⁴ Unless cash or its equivalent is put in the card-minding device, purchasing a card-minding device and buying additional bingo faces on the floor is not considered “insertion of cash.”

- Over-arching Questions

11. Can the player tracking software described above be used directly or indirectly to award prizes to bingo players through a random number generator/program or a drawing?

Answer:

No. The player tracking software described above may not be used directly or indirectly to award prizes to bingo players through a random number generator/program or a drawing. The Commission has not approved player tracking software as described in your request to directly or indirectly award prizes to bingo players through a random number generator/program or a drawing. As stated above in Answer to Question # 8, the Commission is required to examine the additional software on an electronic bingo card-minding device, and disapprove its installation if it allows a player to play a ‘game of chance’ or use a ‘gambling device’ during a bingo occasion.

12. Are there any other statutes, rules or regulations that disallow the use of the above-described system?

⁴ insert. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/insert> (accessed: October 20, 2010).

Answer:

Each situation must be evaluated according to its specific facts. Additional sections of the Rules and Act that may disallow use of the system described in Scenario 2 include, but may not be limited to, the following: 16 TAC § 402.302(i)(4), 16 TAC § 402.300(e)(10), and Tex. Occ. Code § 2001.416.

SUMMARY

A bingo prize is something that is awarded as a result of winning a bingo game. In Scenario 1, if the award is given based solely on “when a predetermined level of participation in playing bingo at that location is reached,” the activity would not fall within the definition of a bingo game. Scenario 2, which provides for a random number generator or a drawing to determine to whom a prize is awarded, would be a game within the bingo occasion for which the card-minding device was sold. However, Scenario 2 would be a prohibited second game of chance.

The fact that a bingo player may receive a prize based solely on his attendance at a number of bingo occasions does not violate 16 TAC § 402.302(d)(10) because the prize would not be awarded for a bingo game. Because the Commission has not approved a bingo game using an electronic or computerized random number generator, and there is no indication that the game would be conducted in accordance with Tex. Occ. Code ch. 2002, the game would not fall within the scope of Rule 402.302(d)(10). The game would violate Tex. Occ. Code § 2001.416(a) which provides that a “game of chance other than bingo or a raffle conducted under Chapter 2002 may not be conducted or allowed during a bingo occasion.” Because neither of the scenarios provided in your request are bingo games, the player tracking prizes would not be considered bingo prizes subject to the prize fee provision of § 2001.502.

Scenario 1 award of prizes before the licensed bingo time does not constitute a violation of conducting bingo outside the licensed times because it would not be a bingo game. Scenario 2 is not an approved bingo game.

The definition of “player tracking software” in 16 TAC § 402.302(6) does not allow for or prohibit the award of prizes triggered by the player tracking software and determined either by a random number generator/program or a drawing. The award of prizes triggered by the player tracking software and determined either by a random number generator/program or a drawing would be an unlawful game of chance prohibited by § 2001.416 unless conducted in accordance with Tex. Occ. Code ch. 2002.

16 TAC § 402.302(d)(7) requires that all records pertaining to player tracking that are generated by the use of a card-minding system must be maintained for a period of not less than 12 months. All card-minding systems must be approved by the Commission before being used or demonstrated. The Commission has not approved an electronic or computerized random number generator for use in conducting bingo. Unless cash or its equivalent is put in the card-minding

device, purchasing a card-minding device and buying additional bingo faces on the floor is not considered "insertion of cash." Furthermore, the Commission has not approved player tracking software as described in the request to directly or indirectly award prizes to bingo players through a random number generator/program or a drawing.

Additional sections of the Rules and Act that may disallow use of the system described in Scenario 2 include, but may not be limited to, the following: 16 TAC § 402.302(i)(4), 16 TAC § 402.300(e)(10), and Tex. Occ. Code § 2001.416.

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,



Philip D. Sanderson, Director
Charitable Bingo Operations Division

cc: Mary Ann Williamson, Chairman
J. Winston Krause, Commissioner
Gary Grief, Executive Director
Kimberly L. Kiplin, General Counsel