

Date

Internal Revenue Service
U.S. Department of the Treasury
CC:PA:LPD:PR (REG-132253-11)
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044\

Re: Information Returns; Winnings From Bingo, keno, and Slot Machines; IRS REG – 132253-11

Dear Sir or Madam:

On behalf of the **Name of Tribe** a federally recognized tribe located within the State of California, we submit these comments in response to the Notice of Proposed Rulemaking (“Notice”) issued by the Department of Treasury and the Internal Revenue Service (collectively, the “Department”), published at 80 Fed. Reg. 11600 (March 4, 2015). In the Notice, the Department requests comments on proposed changes and possible future changes to the reporting requirements for bingo, keno, and slot machine winnings.

I. Introduction

Under the proposed regulations the reportable thresholds from winnings from bingo, keno and slot machine play will remain the same under the existing rules with the exception of electronically tracked slot machine play. The proposed rulemaking on changing the reportable thresholds is based on the Department’s effort to “reach a balance between reporting burden and compliance risk”. Tribe’s perspective is that if the proposed regulations are implemented, the balance will be shifted, resulting in increased compliance risk as patrons may not be incentivized to use the system to track their play. Electronically tracked slot machine play has been developed and used as an important marketing tool.

Tribe’s concern is that the proposed rules are more burdensome than the current process, based on what appears to be a lack of understanding of the player tracking systems functionality currently in use within the industry. The proposal to lower the reporting threshold to \$600 may result in a higher percentage of players who may elect not to enroll in the electronically tracked slot machine play system, thereby increasing the risk of non-compliance and reducing the effectiveness of marketing programs. Based on these concerns, the proposal to change the reporting thresholds for electronically tracked slot machine play as well as future changes in reporting thresholds for bingo, keno and slots should not be considered.

While it seems feasible that wagers should be netted against a winning as with keno, for bingo and slot machine play (other than electronically tracked slot machine play) this would be overly burdensome on Tribe’s government gaming resources. A proposal to make such a change should not be considered at this time due to the IRS’s mistaken assumption that the proposed change assumes that it would be feasible and not unduly burdensome. It is neither.

Name of Tribe has concerns about the proposed rules and the process by which the Department has developed and published the Notice. It appears that the proposed rules will have a “significant regulatory impact” on Tribe’s gaming operation and thus constitutes a “significant regulatory action,” but it fails to consider significant economic impacts on Tribe’s gaming operation.

It does not appear that the costs of implementation of a lowered reporting threshold have been considered. The Notice does not include background data or analysis as to why the proposals are necessary and appropriate. For those reasons, a regulatory proposal that lacks a cost-benefit analysis and fails to include consultation with Indian Tribes and businesses impacted by the rule is deficient. We urge the Department to keep in mind that each dollar that Tribe’s government is required to spend on increased regulatory reporting is one less dollar that is available for important tribal government programs and services to the Reservation community. An increased reporting burden borne by a tribal gaming operation

is unjustified and unnecessary. The basic principles of federal rulemaking require an agency to examine all relevant data and articulate a satisfactory explanation for its actions, including a rational connection between facts found and the choices made. The Notice is lacking in this regard.

Significant procedural deficiencies must be resolved before any further action is taken on the rules and proposals identified in the Notice. We urge the Department to defer action on the Notice until it has fulfilled its consultation and rulemaking obligations to Name of Tribe and other interested tribal governments. We further urge the Department to consider the specific comments and recommendations we have provided below in determining whether to move forward with any of the proposals outlined in the Notice.

Pursuant to Executive Orders 12866, 13175, and 13272, the existence of such effects requires the Department to provide additional information and undertake additional procedures.

II. Specific Comments and Recommendations.

The Notice discusses whether to reduce the reporting threshold amount from \$1,200, which was set in 1977, to \$600.00 at some future date. The Department should not proceed with consideration of the idea of lowering the reporting threshold to \$600.00 because it is unnecessary, overly burdensome, and would result in significant costs and lost revenues to Name of Tribe.

Name of Tribe strongly objects to any proposal to lower the current reporting threshold and urges the Department to withdraw this proposal from further consideration. The proposal to lower the reporting threshold to \$600 for winnings on keno, bingo, and slot machines is very concerning due to the immediate increased burden on Tribe's gaming operation. The change would have a catastrophic impact on Tribe's operation and the gaming industry as a whole. It has been estimated that the proposed regulations would on average cost a gaming facility comparable to Tribe's gaming operation approximately \$550,000 per year. If the reporting threshold is cut in half - reduced from \$1,200 to \$600 - we anticipate a doubling of reportable events. The negative impact on Tribe's gaming facility will be: 1. Increased cost to process the additional reports; 2. Loss of revenue during the additional time that slot machines are locked down while reports are prepared; 3. Increased external auditing costs; 4. Increased compliance risk and reduced effectiveness of marketing efforts as players avoid using the players' club cards essential to electronic tracking of slot machine play.

These added economic burdens are inappropriate and unwarranted, especially when considering that the Department has not articulated any problems of underreporting or compliance to justify this change. We urge the Department to withdraw this proposal from further consideration as it will have a detrimental impact on Name of Tribe, the tribal government gaming industry authorized by the Indian Gaming Regulatory Act, and the entire gaming industry more broadly.

The \$1,200.00 threshold was established a very long time ago at a time when slot machines were very different from the gaming devices currently in operation. Since then, that threshold has not been modified to account for inflation or for the evolution of gaming devices themselves. While it's true that much of our transaction activity is handled electronically, there are still a great many tasks associated with processing taxable winnings that are handled manually.

These tasks require participation by multiple employees and multiple departments based upon required internal control standards for separation of duties. It's safe to assume that reducing the threshold for reporting by 50% would necessitate a 100% increase in full-time employees involved in reporting functions. Falling short of that would cause inconvenience to our patrons that would likely result in fewer visits in favor of a more service-centric form of entertainment. In **Date**, Tribe's gaming operation processed **Number of** taxable jackpots for an average of twenty-four per day with an average of **# of employees** full-time employees, property-wide. If this proposal is implemented, we may need to increase our staffing to **# of employees** with no increase in revenue to support the extra employee compensation expenses. This would drastically impact the net revenue of Tribe's gaming operation and in turn negatively impact tribal government revenue.

In the Notice's preamble, the Department requests comments as to whether electronically tracked slot play should have a separate reporting threshold and whether the reporting levels should be uniform for bingo, keno, and slot machine play. The Department is considering whether these reporting requirements should be revised at a future time.

While Name of Tribe appreciates the opportunity to comment on the Department's possible future changes, we are concerned with the Department's apparent lack of information and context. The Department has made no effort to articulate why these proposals are under consideration, what their intended benefits may be, or the significance of the problem the Department seeks to address. In fact, the Department states that "[B]ased on over 35 years of experience with the current thresholds, the IRS thinks that they are sufficient at this time to verify correct reporting of wagering income".

Further, without the ability to review and understand the underlying basis for the proposal, it is not possible to evaluate or comment on the potential impacts. Therefore, Name of Tribe request that the proposal described in the preamble of the Notice be withdrawn from further consideration.

III. Specific Comments on the definitions of "session" and "electronically tracked slot machine play."

A. Session

Pursuant to §1.6041-10 (b)(3) of the proposed regulations, "a session begins when a patron places the first wager on a particular type of game at the payor's gaming establishment and ends when the patron places his or her last wager on the same type of game before the end of the same calendar day at the same establishment." The definition is not feasible as currently proposed. A patron may enter Tribe's gaming operation on a single calendar day shortly before midnight, sign up for a player's club card (tracked play), receive free play, insert his/her player's card, play the free play, cash out and remove the player's club card, play at another slot machine and not use the card, play at a table game with or without the club card, play at slot machine using the club card, cash out the credits on the second machine and cash out the credits at a kiosk machine for cash, and at some point during the course of that activity, another calendar day may have begun. In reality the Department's definition of "session" would not accurately reflect the player's play, and would not provide any "leveraging" of Tribe's existing technology and processes to report winnings from electronically tracked slot machine play.

In order to leverage the technology, Name of Tribe would depend upon the patrons' using their player's club cards in accordance with the proposed regulations. The number of patrons on any given calendar day is in the thousands; therefore, the variables are too high and may not accurately provide patrons with accurate account of a "session" of play during a calendar day. Rather than shifting the burden from the patron to the payor, the burden on the patron will increase based on patron's misperception that the slot tacking system tracked 100% of their play during the calendar year. At the end of the year when a patron realizes that the gaming operation had not been able to track 100% of their play, the burden will shift back to the patron.

Additionally, the session definition is overly burdensome as casino operations are 24/7 with an established gaming day for Title 31 Compliance that more than likely will be different than a calendar day. Tribe's gaming facility will be burdened with having two "gaming days", one to meet the definition of the proposed regulations for "session" and one to comply with Title 31 regulations.

B. Electronically tracked slot machine play – Compliance with the Rule Embodied Within the Notice Results in an Unfunded Mandate.

The use of player's cards rewards programs is not currently subject to IRS W-2G reporting thresholds and therefore the programs are not designed to accurately track winnings or the purpose of reporting winnings to the IRS. Accordingly, costly changes will need to be made to existing player's card reward programs in order to comply with the proposed rule. The cost of such changes, and the cost of ongoing future compliance with the proposed rule, must be determined in order to adequately evaluate the proposed rule. Executive Order 13175 requires federal agencies to "reduce the

imposition of unfunded mandate upon Indian tribes.” Tribal consultation on this issue and the Notice are necessary if these compliance costs are to be imposed on the tribal governments that own and operate gaming facilities.

C. The Notice Fails to Provide the Data and Analysis Necessary to Fully Understand the Impacts of the Proposed New Rules for Electronically Tracked Slot Machine Play.

The proposed rules concerning electronically tracked slot machine play will operate to effect a major change in the way reportable winnings are calculated. Under well-established principles of federal rulemaking, when a federal agency establishes new federal standards, it is first obligated to furnish adequate data and a reasoned analysis supporting the change¹.

The Department has not articulated how the proposed electronically tracked slot machine play rules will actually fill a regulatory void or address existing compliance concerns. Moreover, the Department cites no facts or evidence to support its assertions that advances in gaming technology are reducing burdens with respect to reporting electronically tracked play. As noted below, no cost-benefit analysis or RFA assessment has been provided in support of the new rules. As such, it is not possible to fully understand the implications of the proposed new rules. We are concerned that the Department has not have given due consideration to the compliance costs and revenue losses associated with the proposed rules for electronically tracked play, including the technological ability to meet the new standards. We are also concerned with the detrimental impact that the new rules will have on the use of player's club cards, which are primarily used as marketing devices and not to track winnings for tax reporting purposes. To that end, we urge the Department to provide a detailed explanation of the economic considerations of the proposed rule, an assessment of the technologic ability to meet the particular regulatory standards in the proposed rule, and reasonable alternatives before proceeding further.

IV. Procedural Concerns

A. Executive Order 13175: The Department Failed to Consult with Tribal Governments Regarding the Changes and Proposals Presented in the Notice.

The Department’s failure to consult with tribal governments prior to publication of the Notice contradicts the provisions of Executive Order 13175 and the Department’s own Chief Counsel Directives Manual (CCDM), both of which require the Department to engage in meaningful consultation in the development of regulations that have tribal implications². Executive Order 13175 was reaffirmed in 2009 when President Obama issued the Presidential Memorandum on Tribal Consultation³. In particular, Executive Order 13175 provides that prior to promulgation of regulations, agencies must “consult with tribal officials early in the process of developing the proposed regulation” (emphasis added)⁴. This same requirement is set forth in the CCDM.

Executive Order 13175 further provides that the need for Federal standards and any alternatives that would limit the scope of Federal standards must be included within the tribal consultation process⁵. In accordance with the Department’s consultation policy, the Department is to “seek comment on compliance costs as appropriate to the nature of the regulation or guidance under development.”⁶

Executive Order 13175 obliges the Department to consult with tribal governments on proposals which would have “substantial direct effects” on tribal governments and their gaming enterprises. These substantial direct effects would be

¹Executive Order 12866, Regulatory Planning and Review §1 (b), 58 Fed. Reg. 51735, 51735-36 (Sept. 30, 1993).

² Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,149,67,250 (Nov. 6, 2000); IRS, Chief Counsel Directives Manual (CCDM) §32.1.5.4.7.

³ 74 FR 57879 (Nov. 9, 2009)

⁴ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249,67,250 (Nov. 6, 2000)

⁵ *Id.*

⁶ U.S. Dep’t of the Treasury Interim Tribal Consultation Policy, 79 Fed. Reg. 71816,71,817 (Dec. 3, 2014).

measured by Tribe's cost of compliance through both development of new internal controls and compliance protocols, through the time and expense of reporting – each of which could add significantly to the cost of doing business, as well as increased payroll cost with no return on net revenue that was more thoroughly described above. Every proposal to increase the operational and compliance burden on Name of Tribe is a matter of significance affecting important tribal interests, for which consultation is required. As noted above, the Notice lacks any analysis and data regarding the costs of implementation.

Therefore, Name of Tribe requests that the Department defer action on the Notice until such time as it has engaged in meaningful consultation with tribal governments regarding the need for, and impacts of, the Notice. We emphasize that in order for consultation to be meaningful, it must occur early in the process of developing a proposed regulation, and commence before the Department concludes that any single solution is appropriate to resolve an issue.

B. Executive Order 12866: The Notice Does Not Adhere to the Principles of Regulation Identified in Executive Order 12866.

Executive Order 12866 requires that the Department employ an economic analysis of any proposed regulation. Any agency seeking to promulgate a regulation must have adequate information that indicates the need for and the consequences of a proposed action and includes less burdensome methods of addressing the core issue identified by the agency.⁷ Additionally, the Department must “base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.”⁸ As the Notice is lacking in underlying economic impact analysis, it seems difficult for the Department to conclude that the rule embodied within the Notice would not be a “significant regulatory action.” Accordingly, it appears that the Department would contravene Executive Order 12866 if it were to adopt the rule embodied within the Notice without a cost-benefit analysis, including an analysis of taking no action. We encourage the Department to abide by the principles and regulatory plan requirements of Executive Order 12866.

C. Regulatory Flexibility Act and Executive Order 13272: The Department's Regulatory Flexibility Act Assessment Is Deficient.

The proposed rule has not been developed in compliance with the Regulatory Flexibility Act⁹ (“RFA”), which requires federal agencies to analyze the impact a rule may have on small businesses and seek a less burdensome alternative if that impact is substantial. Impact analysis is also required by Executive Order 13272¹⁰.

In the Notice preamble, the Department certified that the proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. In its analysis, the Department focuses exclusively on two components of the proposed rules. First, the Department states “that this rule merely provides guidance as to the timing and filing of information reporting returns for payors.”¹¹ Second, the Department states that “this rule is reducing the existing burden . . . by simplifying the process for payors to verify payee's identities . . . and also by allowing payors to reduce the number of information returns they issue.”¹²

Missing from this analysis is a discussion of the economic impacts on tribal government gaming enterprises of the proposed new rules. If promulgated, the new rules in the Notice would significantly change the process by which reportable winnings are calculated for electronically tracked slot machine play. Because the reporting requirements are a significant component of the Notice, these proposed new rules are subject to the RFA requirements.

The Department must conduct an RFA analysis of the proposed rules for electronically tracked slot machine play before it proceeds with the Notice. The analysis will be especially important in understanding the financial burdens imposed by

⁷ See, e.g., Executive Order 12866

⁸ *Id.* At Sec. 1(b)(7), 58 Fed. Reg. at 51736.

⁹ 5 USC 601 *et seq.*

¹⁰ Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking, 67 Fed. Reg. 53461 (Aug. 13, 2002).

¹¹ U.S. Dept't of the Treasury, Internal Revenue Service, 80 Fed. Reg. 11600, 11603 (proposed March 4, 2015).

¹² *Id.*

the proposed rule, particularly in relation to the changes required to accommodate the new reporting requirements. The technology to implement the new reporting procedures is not now readily available, which means that significant costs will be incurred to update and modify existing player tracking systems.

Given the current lack of appropriate technology, we believe the proposed new rules relating to electronically tracked slot play will have a significant adverse economic impact on a substantial number of small business entities. At the very least, the proposed rules will impact small business entities formed by tribal governments to operate their gaming activities. Thus, in order to satisfy the requirements of the RFA, the Department must analyze the financial impacts of its proposed new rules for electronically tracked slot machine play before proceeding further.

V. There Is No Factual Basis to Support Changing the Current Reporting Requirements for Bingo, Keno, or Slot Machine Play.

In the preamble, the Department requests comments as to whether electronically tracked slot play should have a separate reporting threshold and whether the reporting levels should be uniform for bingo, keno, and slot machine play. The Department is considering whether these reporting requirements should be revised at a future time. While we appreciate the opportunity to comment on the Department's possible future changes, we are concerned with the lack of information and context. The Department has made no effort to articulate why these proposals are under consideration, what their intended benefits may be, or the significance of the problem the Department seeks to address. Without the ability to review and understand the underlying basis for these proposals, it is not possible to evaluate or comment on their potential impacts. We request that the proposals described in the preamble of the Notice be withdrawn from further consideration.

VI. CONCLUSION

Name of Tribe urges the Department to take no further action on the Notice unless and until it has fulfilled its consultation and rulemaking responsibilities and thoroughly considered the impacts of its proposals. We look forward to working with the Department on a government-to-government basis to resolve these issues and develop Department policies that are consistent with federal Indian law and policy and in furtherance of the trust obligation owed to tribal governments.

Further, the IRS should not proceed with consideration of the idea of lowering the reporting threshold to \$600.00 because it is unnecessary, overly burdensome, and would result in significant costs to the tribal government gaming industry, depriving tribal governments of the benefits Congress intended they should receive by operating gaming enterprises pursuant to the Indian Gaming Regulatory Act.

Respectfully,