April 27, 2012

Ms. Tracie Stevens, Chairwoman
Ms. Steffani A. Cochran, Vice-Chairperson
Mr. Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

Re: Preliminary Discussion Draft of 25 C.F.R. Part 547: Class II Technical Standards

Dear Commissioners:

The Iowa Tribe of Oklahoma ("Tribe") offers the following comments on the proposed revisions contained in the National Indian Gaming Commission's ("Commission") preliminary Discussion Draft of the Class II Technical Standards. The Tribe appreciates the opportunity to participate in the consultation process and continues to be encouraged by the Commission's efforts to reach out to tribes during the initial planning stages of the rulemaking process. As recognized in the Commission's Draft Consultation Policy, for consultation to be meaningful, it must happen *early* and *often*. The Commission's release of the Discussion Draft for public comment reflects the Commission's commitment to full and effective consultation with tribes and helps ensure that the proposed rule and ultimately the final rule accommodates tribal concerns and interests to the maximum extent permitted under law.

Before providing our specific comments below, the Tribe wishes to express its support for the Commission's use of Tribal Advisory Committees ("TACs") and the Tribal Gaming Working Group ("TGWG") in identifying problems and proposing solutions. A collaborative, multidisciplinary approach can become especially useful when dealing with complex regulations such as the Class II Technical Standards, which involve a wide range of technical issues that affect a variety of different stakeholders. The Tribe encourages the Commission to continue drawing on the technical expertise and knowledge provided by the TACs and the TGWG during this rulemaking process.

In reviewing this Discussion Draft, we were pleased to see that the Commission has addressed several concerns previously raised by tribes, the TACs, and the TGWG. Specifically, we were pleased that the Discussion Draft no longer contains the arbitrary minimum probability requirements in existing § 547.5, which were inconsistent with the probability standards applicable to most, if not all, charitable bingo operations and state lotteries. We also support the proposed removal of provisions requiring Underwriter's Laboratory testing of player interfaces. We note that statutes administered by other federal agencies regarding the establishment and enforcement of product safety standards should provide adequate protection in this regard. And finally, we strongly support the proposed removal of "entertaining display" references as they relate to Class II player interface display requirements. We do not believe that requirements relating to entertaining displays should be set by regulation, as the entertaining display itself is irrelevant for regulatory purposes and without any legal significance whatsoever to the outcome of the game.

Despite the foregoing, we note there are still a number of issues that would benefit from additional revisions, the most important of which relate to the grandfather provisions in the Discussion Draft. We thus urge the Commission to make revising the grandfather provisions one of its top priorities as it moves forward with the rulemaking process.

*Proprietary Class II System Component.* The Commission is proposing to add a new definition of a proprietary Class II system component, even though the term is not used anywhere else in the Discussion Draft. The defined term adds no value to the Discussion Draft and should thus be removed to minimize the potential for confusion and misinterpretation. In the alternative, we ask for guidance on how the term will be applied so that tribes can provide more informed input on the meaning and application of the term.

*Reflexive Software.* We are concerned that the term *reflexive software* may be misinterpreted to inadvertently cover existing games that include awards such as "good neighbor" prizes, which we note have always been a part of the game commonly known as bingo. We ask that the term be amended to identify the harm associated with the term – i.e., prizes that are denied to a player who would otherwise be entitled to such prize based on the random outcome of the game.

*Primary Regulatory Authority of Tribes.* The Indian Gaming Regulatory Act (IGRA) explicitly designates tribes as the primary regulators of their gaming activities by recognizing that tribes have "the *exclusive* right to regulate gaming activity on Indian lands." (Emphasis added). Congress' use of the term "exclusive right" indicates that it did not intend for tribes to share its regulatory responsibilities with some other entity.

The Discussion Draft, however, misstates the regulatory authority of tribal gaming regulatory agencies (TGRAs) in § 547.3(a) by stating that "TGRAs *also* regulate Class II

gaming." (Emphasis added). This proposed language suggests that TGRAs share their regulatory responsibilities with some other entity, which is inconsistent with the explicit statement in IGRA regarding the status of tribes as the *exclusive* regulators of their gaming activities. We therefore ask the Commission to revise the statement in § 547.3(a) to more accurately reflect the role of TGRAs as the primary regulators of their gaming activities.

*Grandfather Provisions*. In reviewing the Discussion Draft, the Tribe was disappointed to find that the Commission had not removed the controversial five-year sunset clause from the regulation. Rather than remedying the principal flaws of the grandfather provisions in the existing regulation, the Discussion Draft threatens to cause even greater harm by threatening to invalidate currently compliant Class II systems. The Discussion Draft now requires that all previously certified systems to have been tested against standards that have just been introduced in the Discussion Draft. Since these new standards were unavailable at the time of testing, it is now virtually impossible for any system or product to maintain their certifications.

With respect to the five-year sunset clause, the general consensus among tribal leaders, regulators, attorneys, and industry representatives is that the sunset clause will have a devastating effect on the Class II gaming industry and tribal gaming operations, many of which depend on Class II gaming as a vital source of revenue. We note that significant human and economic capital have been invested by tribes in developing and marketing certain Class II gaming systems based on their lawfulness and availability in the marketplace. Furthermore, millions of dollars have been spent by tribes vindicating the lawfulness of certain Class II gaming systems through litigation.

The grandfather provisions, as drafted, fail to mitigate these significant losses or acknowledge the lawfulness of certain court-sanctioned Class II gaming systems. The Discussion Draft still requires the removal of all grandfathered Class II gaming systems by the end of the five-year sunset period, which, effectively operates as a product recall by the Commission. In the regulatory context, a product recall is usually prompted by evidence of or the potential for an imminent threat to the public health and safety.

We are, however, unaware of any evidence suggesting that grandfathered Class II gaming systems are or could be defective or harmful in any way. Indeed, most, if not all, grandfathered systems have been operating without any safety or integrity issues for many years. In light of this, it seems unreasonable that the regulations do not protect the continued use of grandfathered and court-sanctioned systems. We therefore ask that the Commission remove the five-year sunset clause and include language that will authorize the continued use of any Class II gaming product that has been previously certified under current or any pre-existing Technical Standards or approved by a federal court decision.

*Odds Disclosure Requirement*. Section 547.16(c) of the Discussion Draft requires player interfaces to "*continually* display the following statement: "Odds of winning the advertised top price exceeds 100 million to one." We are concerned with the practical implications of requiring the *continuous* display of the game odds, especially given that certain gaming devices such as handhelds typically have much smaller screens than their traditional counterparts. Moreover, we believe this new requirement is unnecessary in light of the requirements in § 547.16(a) of the Discussion Draft, which require game rules and prize schedules to be displayed at all times, or be "made readily available to the player *upon request,*" meaning, the tribe is already required to disclose odds information upon request by a patron.

In closing, the Tribe wishes to thank the Commission again for this opportunity to submit comments on the Discussion Draft of the Class II Technical Standards. We ask that you give favorable consideration to our comments above as you move forward with the rulemaking process.

Sincerely,

Janice Rowe-Kurak

Janice Rowe-Kurak
Chairman
Iowa Tribe of Oklahoma