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VIA E-mail to [reg.review@nigc.gov](mailto:reg.review@nigc.gov)

Tracie L. Stevens, Chairwoman  
Steffani A. Cochran, Vice-Chairperson  
Daniel Little, Associate Commissioner  
National Indian Gaming Commission  
1441 L Street, N.W., Suite 9100  
Washington, D.C. 20005

Re: Comments on Discussion Draft Part 543: Minimum Internal Control Standards for Class II Gaming

Dear Chairwoman Stevens, Vice-Chairperson Cochran and Commissioner Little:

On behalf of the Seminole Tribe of Florida (the "Tribe"), we offer the following comments on the National Indian Gaming Commission's ("NIGC") Discussion Draft Part 543 Minimum Internal Control Standards ("MICS") for Class II Gaming. In its prior comments, the Tribe supported the NIGC's decision to delay the effective date of the final rule for Class II MICS, and encouraged the NIGC to implement an effective, open and transparent consultation process to consider revisions to these critically important regulations. The Tribe commends the NIGC for adopting such a process and for seeking to streamline, modernize and improve the Class II MICS in a manner that protects the integrity of Class II gaming and preserves tribal assets.

The Discussion Draft Class II MICS reflect this process, and the commitment on the part of the NIGC to focus on tribal proposals and develop these regulations in a manner that ensures meaningful and ongoing tribal consultation. The Tribe appreciates the fact that the NIGC has issued these regulations as a discussion draft prior to publishing them as a proposed rule. Doing so is helpful to furthering the type of government-to-government dialogue that is essential to ensuring that these regulations establish effective controls that can be implemented by Tribal Gaming Regulatory Authorities.

The Tribe recognizes that it is still early in the regulatory process, and that more work needs to be done and broader consultation needs to take place, before the Discussion Draft MICS will be ready to be published as a proposed rule. Although the Discussion Draft MICS are a vast improvement over the Final (but not yet effective) Class II MICS, the Tribe has a number of concerns about the new Discussion Draft.

First, although the Tribe recognizes that the NIGC has received considerable input from the Tribal Advisory Committee designated to assist it in preparing these Class II MICS, and has received feedback from a variety of tribes and tribal organizations, such input does not substitute for broader tribal consultation. The Tribe believes that circulating this draft and making it available for comment is a positive first step in broader tribal consultation on the regulations under consideration.

Second, the Tribe is concerned that the Discussion Draft is unbalanced, as some provisions contain a great deal of detail, whereas others do not. It is unclear from a review of the Discussion Draft on its face why certain provisions warrant such a significantly greater level of detail than others.

Third, the Tribe is concerned that the NIGC may be considering adding more detail to some of these provisions through the use of so-called "guidance" documents or bulletins. While the use of guidance and bulletins is a standard practice of federal agencies, great care must be taken when doing so. Non-binding guidance documents and bulletins are not generally subject to notice and comment rulemaking, and accordingly can be changed due to changing policies by future Commissions without the opportunity for notice and public comment. At the same time, however, they can be accorded deference by the courts to the extent they have the power to persuade. As a result, care must be taken to ensure that any such guidance truly guides by providing information and assistance, rather than suggest or lead to any particular result. In the context of MICS, for example, to the extent guidance is used, any such document must not, for example, read like model TICS. While model TICS might be appropriate for certain tribes, they are certainly not one size fits all and cannot form the basis for a bulletin or guidance. Similarly, any such guidance cannot suggest that a particular result is better than another (i.e., best practices), or contain dictates or imperatives (i.e., must or shall). Agencies that attempt to promulgate binding requirements through guidance, or begin treating agency guidance as binding (i.e., audit staff in the field holding up Class II MICS guidance as an example of how to run an operation), have routinely had such documents overturned by the courts.

Finally, the Tribe has significant concerns about several areas in the Discussion Draft that warrant further consideration. Following are a few examples:

*Definition of Bingo.* The Discussion Draft departs from the current MICS in that it contains two separate sets of controls for bingo. One set is for "Class II Gaming System Bingo" and one set is for "Manual Bingo." This makes little sense and will be operationally impractical to implement. First, neither term is defined. As a result, it will be very difficult for operations to determine which set of controls apply to which bingo games. For example, the "Manual Bingo" MICS contain a set of provisions that allow for the use of technologic aids. How is a gaming operation to distinguish between a

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"manual" bingo game being played with technologic aids and a "class II gaming system" bingo game being played with technologic aids? By definition, all Class II bingo games are played on a system, regardless of the technology being used.

Second, the IGRA allows a full spectrum of technologic aids to be used in the play of bingo. Accordingly, one system might be completely manual with no technologic aids whatsoever, one may have an electronic ball draw but otherwise be fully manual, one might use an electronic ball draw and electronic cards, while yet another might use some other combination. All are permissible under the IGRA, and all should be subject to the same operational MICS controls. There is no reasoned or principled way to distinguish controls for bingo based on the type of technologic aid that is being used. The NIGC should abandon this approach. It will simply be unworkable on the ground.

*SICS.* The Tribe strenuously objects to the NIGC's proposal to regulate the Tribe's internal system of operations it uses to comply with its TICS and the federal MICS. The "SICS" requirements in the Discussion Draft are well beyond the NIGC's regulatory authority, and would add an additional level of federal bureaucratic control that is duplicative of tribal efforts and wholly unnecessary. This concept should be abandoned.

First, the concept of requiring SICS as a federal requirement is unnecessary. Tribes already necessarily have a system of operational controls they use to comply with the TICS and the MICS. How else could a Tribe ensure that its operations comply with its TICS? The NIGC already has the authority to ensure that a Tribe is meeting the MICS. Adding the concept of SICS to the MICS simply adds a third level of federal bureaucracy to controls the NIGC already has.

Second, it is beyond the NIGC's regulatory authority. The IGRA does not authorize the NIGC to tell a tribe how to staff its operations, which specific personnel should have which function required by the TICS and MICS, or how they should interact in order to comply with the MICS. The IGRA grants the NIGC the authority to ensure that the MICS are being met. It is for the tribes to create a system to ensure that they are being met.

Third, the SICS are ill-defined and would represent an enormous, and unauthorized, increase in the NIGC's regulatory power. The definition does not state what constitutes a "proper" SICS. Yet Discussion Draft section 543.3(h) would authorize the NIGC to impose penalties on the Tribe for "deficiencies" in its SICS. Under this regulatory scenario, NIGC would be able to impose penalties on a Tribe if it did not believe the Tribe's SICS were sufficient. This would be an entirely subjective "standardless" standard, and as a result would grant the NIGC enormous, and as discussed above, unlawful power to threaten a gaming operation with penalties unless the

operation began implementing the MICS in the manner the NIGC prefers. This approach should also be abandoned.

*Agents.* The Tribe believes that the use of the term "agent" throughout the MICS should be carefully revisited. As drafted, the definition of "agent" would appear to require the agent to be a person. However, as used, the term would appear to include instances where an "agent" would necessarily have to be a computer or system control. For example, in the Class II gaming system bingo controls, the MICS would require at least two agents to determine the validity of a claim prior to paying a prize, and two agents must verify that the winning pattern has been achieved. As drafted, this would require two people to stand next to each Class II bingo player station. The Tribe doubts the NIGC intended to impose such an enormous increase in staffing on Class II operations across the country. The Tribe encourages the NIGC to revisit the concept of agents throughout the MICS to determine which controls require the presence of a person and which controls are more appropriately addressed through the bingo system itself.

*Gaming promotions.* The Tribe also objects to controls being imposed on promotional activities. The current MICS do not contain controls for promotional activities, and these new controls would be a marked departure for the NIGC. By definition, a promotional activity is not gaming, as there is no consideration involved. Accordingly, the NIGC lacks authority to regulate such activity. The Tribe already has a rigorous system for ensuring that all of its promotions are controlled and additional federal controls are unnecessary.

*Technical Standards.* The Discussion Draft contains a number of new requirements that may implicate the technical specifications of the games and gaming systems being used, and as a result require careful review and further consideration. For example, the MICS for Information Technology impose a number of requirements on Class II gaming that may or may not already be addressed in the Technical Standards. One of these is a requirement that records must be kept of all new installations or modifications to Class II gaming systems, but it is not made clear who is to keep and maintain such records. Another would require that unused services and non-essential ports must be disabled. These are technical requirements more appropriate for Technical Standards. The Tribe believes the NIGC should ensure that games authorized for play under the Technical Standards can meet these new requirements.

*Surveillance.* The Tribe supports the NIGC's decision to allow overview camera coverage for card game tournaments. However, the Tribe questions the requirement to have dedicated camera surveillance of the Class II game server. Often, these servers are located in a secured location, and may even be located off-site in a secured location. Having a dedicated camera providing continuous coverage of an immobile server box in a secured location seems unwarranted.

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The foregoing are intended to be illustrative examples of some of the issues that still need to be addressed in these MICS before they can be finalized. That said, the Tribe remains encouraged by the approach taken by the NIGC, and supports many of the changes made by the NIGC in these new MICS. As a whole, the draft MICS are a marked improvement over the current final (but not yet effective) MICS.

As always, the Tribe strongly believes in the principle of government-to-government consultation on issues such as this, and appreciates the dialogue NIGC has opened with tribal governments by circulating this discussion draft. The Tribe looks forward to continued government-to-government consultation with the NIGC on this critically important issue.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER LLP

*Joseph H. Webster /s/*

By: Joseph H. Webster

cc: Jim Shore, Esq.