

## § 543.18 How does a gaming operation apply for a variance from the standards of this part?

### Comparison of July TGWG Submission to July 2010 Draft MICS

In 2010, the NIGC posted on its web-site draft Class II MICS. Because the NIGC has not promulgated an equivalent provision to 542.18, the TGWG worked from the Class III MICS to create a proposed provision for Class II.

Editing convention: The words in blue (underlined) and red (struck-through) are the additions and deletions made by the TGWG.

July 2010 Draft MICS	TGWG Version
<p><b>No equivalent provision.</b> Due to the fact that there is no 2010 draft regulation corresponding to 543.18, the TGWG proposed text is compared to the existing 542.18 text (which the TGWG edited for purposes of its recommendation).</p> <p><b>§ 542.18 How does a gaming operation apply for a variance from the standards of this part?</b></p> <p>(a) <u>Tribal gaming regulatory authority approval.</u> (Revised May 4, 2005)</p> <p>(1) A Tribal gaming regulatory authority may approve a variance for a gaming operation if it has determined that the variance will achieve a level of control sufficient to accomplish the purpose of the standard it is to replace.</p> <p>(2) For each enumerated standard for which the Tribal gaming regulatory authority approves a variance, it shall submit to the Chairman of the NIGC, within thirty (30) days, a detailed report, which shall include the following:</p> <p>(i) A detailed description of the variance;</p> <p>(ii) An explanation of how the variance achieves a level of control sufficient to accomplish the purpose of the standard it is to replace; and</p> <p>(iii) Evidence that the Tribal gaming regulatory authority has approved the variance.</p> <p>(3) In the event that the Tribal gaming regulatory authority or the Tribe chooses to submit a variance request directly to the Chairman, it may do so without the approval requirement set forth in paragraph (a)(2)(iii) of this section and such request shall be deemed as having been approved by the Tribal gaming regulatory authority.</p> <p>(b) <u>Review by the Chairman.</u> (Revised May 4, 2005)</p> <p>(1) Following receipt of the variance approval, the Chairman or his or her designee shall have sixty (60) days to concur with or object to the approval of the variance.</p> <p>(2) Any objection raised by the Chairman shall be in the form of a written explanation based upon the following criteria:</p>	<p><del>§ 542.18</del> <b>543.18</b> How does a gaming operation apply for a variance from the standards of this part?</p> <p>(a) <del>Tribal gaming regulatory authority approval.</del> (Revised May 4, 2005) <u>Variance.</u></p> <p>(1) <del>A Tribal gaming regulatory authority may approve a variance for a gaming operation if it has determined that the variance will achieve a level of control sufficient to accomplish the purpose of the standard it is to replace.</del> <u>Should a TGRA grant a variance to any provision of these MICS, the TGRA shall deliver a notice of the same to the Commission within ten (10) days of such approval.</u></p> <p>(2) <del>For each enumerated standard for which the Tribal gaming regulatory authority approves a variance, it shall submit to the Chairman of the NIGC, within thirty (30) days, a detailed report, which shall include the following:</del></p> <p>(i) <del>A detailed description of the variance;</del></p> <p>(ii) <del>An explanation of how the variance achieves a level of control sufficient to accomplish the purpose of the standard it is to replace; and</del></p> <p>(iii) <del>Evidence that the Tribal gaming regulatory authority has approved the variance.</del></p> <p>(3) <del>In the event that the Tribal gaming regulatory authority or the Tribe chooses to submit a variance request directly to the Chairman, it may do so without the approval requirement set forth in paragraph (a)(2)(iii) of this section and such request shall be deemed as having been approved by the Tribal gaming regulatory authority.</del></p> <p>(b) <del>Review by the Chairman.</del> (Revised May 4, 2005)</p> <p>(1) <del>Following receipt of the variance approval, the Chairman or his or her designee shall have sixty (60) days to concur with or object to the approval of the variance.</del></p> <p>(2) <del>Any objection raised by the Chairman shall be in the form of a written explanation based upon the following criteria:</del></p>

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<p>(i) There is no valid explanation of why the gaming operation should have received a variance approval from the Tribal gaming regulatory authority on the enumerated standard; or</p> <p>(ii) The variance as approved by the Tribal gaming regulatory authority does not provide a level of control sufficient to accomplish the purpose of the standard it is to replace.</p> <p>(3) If the Chairman fails to object in writing within sixty (60) days after the date of receipt of a complete submission, the variance shall be considered concurred with by the Chairman.</p> <p>(4) The 60-day deadline may be extended, provided such extension is mutually agreed upon by the Tribal gaming regulatory authority and the Chairman.</p> <p>(c) <u>Curing Chairman's objections.</u> (Revised May 4, 2005)</p> <p>(1) Following an objection by the Chairman to the issuance of a variance, the Tribal gaming regulatory authority shall have the opportunity to cure any objections noted by the Chairman.</p> <p>(2) A Tribal gaming regulatory authority may cure the objections raised by the Chairman by:</p> <p>(i) Rescinding its initial approval of the variance; or</p> <p>(ii) Rescinding its initial approval, revising the variance, approving it, and re-submitting it to the Chairman.</p> <p>(3) Upon any re-submission of a variance approval, the Chairman shall have thirty (30) days to concur with or object to the re-submitted variance.</p> <p>(4) If the Chairman fails to object in writing within thirty (30) days after the date of receipt of the re-submitted variance, the re-submitted variance shall be considered concurred with by the Chairman.</p> <p>(5) The thirty (30) day deadline may be extended, provided such extension is mutually agreed upon by the Tribal gaming regulatory authority and the Chairman.</p> <p>(d) <u>Appeals.</u> (Revised May 4, 2005)</p> <p>(1) Upon receipt of objections to a re-submission of a variance, the Tribal gaming regulatory authority shall be entitled to an appeal to the full Commission in accordance with the following process:</p> <p>(i) Within thirty (30) days of receiving an objection to a re-submission, the Tribal gaming regulatory authority shall file its notice of appeal.</p> <p>(ii) Failure to file an appeal within the time provided by this section shall result in a waiver of the opportunity for an appeal.</p> <p>(iii) An appeal under this section shall specify the reasons why the Tribal gaming regulatory authority</p>	<p>(i) <del>There is no valid explanation of why the gaming operation should have received a variance approval from the Tribal gaming regulatory authority on the enumerated standard; or</del> <u>The notice shall contain a complete copy of the information presented to the TGRA and the variance as granted.</u></p> <p>(ii) <del>The variance as approved by the Tribal gaming regulatory authority does not provide a level of control sufficient to accomplish the purpose of the standard it is to replace.</del></p> <p><del>(3) If the Chairman fails to object in writing within sixty (60) days after the date of receipt of a complete submission, the variance shall be considered concurred with by the Chairman.</del></p> <p><del>(4) The 60-day deadline may be extended, provided such extension is mutually agreed upon by the Tribal gaming regulatory authority and the Chairman.</del></p> <p><del>(e) Curing Chairman's objections. (Revised May 4, 2005)</del> <u>notice shall be forwarded to the Commission within ten (10) days of the granting of the Variance.</u></p> <p><u>(2) During a thirty (30) day period when the Commission first receives the notice required by this subpart, the Chairman may request additional information from the TGRA concerning the subject of variance. Such request shall suspend the thirty (30) day period until the Chairman receives the TGRA response.</u></p> <p><u>(b) Commission Review.</u></p> <p>(1) <del>Following an objection by the Chairman to the issuance of a variance, the Tribal gaming regulatory authority shall have the opportunity to cure any objections noted by the Chairman.</del> <u>Within the thirty (30) day review period, the Commission may:</u></p> <p><del>(2) A Tribal gaming regulatory authority may cure the objections raised by the Chairman by:</del></p> <p>(i) <del>Rescinding its initial approval of the variance; or</del></p> <p>(ii) <del>Rescinding its initial approval, revising the variance, approving it, and re-submitting it to the Chairman.</del></p>
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<p>believes the Chairman's objections should be reviewed, and shall include supporting documentation, if any.</p> <p>(iv) The Tribal gaming regulatory authority shall be provided with any comments offered by the Chairman to the Commission on the substance of the appeal by the Tribal gaming regulatory authority and shall be offered the opportunity to respond to any such comments.</p> <p>(v) Within thirty (30) days after receipt of the appeal, the Commission shall render a decision based upon the criteria contained within paragraph (b)(2) of this section unless the Tribal gaming regulatory authority elects to wave the thirty (30) day requirement and to provide the Commission additional time, not to exceed an additional thirty (30) days, to render a decision.</p> <p>(vi) In the absence of a decision within the time provided, the Tribal gaming regulatory authority's resubmission shall be considered concurred with by the Commission and become effective.</p> <p>(2) The Tribal gaming regulatory authority may appeal the Chairman's objection to the approval of a variance to the full Commission without resubmitting the variance by filling a notice of appeal with the full Commission within thirty (30) days of the Chairman's objection and complying with the procedures described in paragraph (d)(1) of this section.</p> <p>(e) <u>Effective date of variance.</u> The gaming operation shall comply with standards that achieve a level of control sufficient to accomplish the purpose of the standard it is to replace until such time as the Commission objects to the Tribal gaming regulatory authority's approval of a variance as provided in paragraph (b) of this section. Concurrence in a variance by the Chairman or Commission is discretionary and variances will not be granted routinely. The gaming operation shall comply with standards at least as stringent as those set forth in this part until such time as the Chairman or Commission concurs with the Tribal gaming regulatory authority's approval of a variance. (Revised May 4, 2005)</p>	<p><del>(3) Upon any re-submission of a variance approval, the Chairman shall have thirty (30) days to concur with or object to the re-submitted variance.</del></p> <p><del>(4) If the Chairman fails to object in writing within thirty (30) days after the date of receipt of the re-submitted variance, the re-submitted variance shall be considered concurred with by the Chairman.</del></p> <p><del>(5) The thirty (30) day deadline may be extended, provided such extension is mutually agreed upon by the Tribal gaming regulatory authority and the Chairman.</del></p> <p><del>(d) Appeals. (Revised May 4, 2005)</del></p> <p><del>(1) Upon receipt of objections to a re-submission of a variance, the Tribal gaming regulatory authority shall be entitled to an appeal to the full Commission in accordance with the following process: Comment — Jess to revise to mirror licensing language in IGRA.</del></p> <p><del>(i) Within thirty (30) days of receiving an objection to a re-submission, the Tribal gaming regulatory authority shall file its notice of appeal.</del></p> <p><del>(ii) Failure to file an appeal within the time provided by this section shall result in a waiver of the opportunity for an appeal.</del></p> <p><del>(iii) An appeal under this section shall specify the reasons why the Tribal gaming regulatory authority believes the Chairman's objections should be reviewed, and shall include supporting documentation, if any.</del></p> <p><del>(iv) The Tribal gaming regulatory authority shall be provided with any comments offered by the Chairman to the Commission on the substance of the appeal by the Tribal gaming regulatory authority and shall be offered the opportunity to respond to any such comments.</del></p> <p><del>(v) Within thirty (30) days after receipt of the appeal, the Commission shall render a decision based upon the criteria contained within paragraph (b)(2) of this section unless the Tribal gaming regulatory authority elects to wave the thirty (30) day requirement and to provide the Commission additional time, not to exceed an additional thirty (30) days, to render a decision.</del></p> <p><del>(vi) In the absence of a decision within the time provided, the Tribal gaming regulatory authority's resubmission shall be considered concurred with by the Commission and become effective.</del></p> <p><del>(2) The Tribal gaming regulatory authority may appeal the Chairman's objection to the approval of a variance to the full Commission without resubmitting the variance by filling a notice of appeal with the full Commission within thirty (30)</del></p>
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	<p><del>days of the Chairman's objection and complying with the procedures described in paragraph (d)(1) of this section.</del></p> <p><del>(e) Effective date of variance. The gaming operation shall comply with standards that achieve a level of control sufficient to accomplish the purpose of the standard it is to replace until such time as the Commission objects to the Tribal gaming regulatory authority's approval of a variance as provided in paragraph (b) of this section. Concurrence in a variance by the Chairman or Commission is discretionary and variances will not be granted routinely. The gaming operation shall comply with standards at least as stringent as those set forth in this part until such time as the Chairman or Commission concurs with the Tribal gaming regulatory authority's approval of a variance.</del> <u>(Revised May 4, 2005) Advise the TGRA, in writing, that it has no objection.</u></p> <p><u>(ii) Provide the TGRA a written statement itemizing its objections.</u></p> <p><u>(iii) Take no action, in which case, the TGRA's variance shall be final.</u></p> <p><u>(2) If the Commission has provided the TGRA a statement itemizing objections to the variance:</u></p> <p><u>(i) The TGRA shall reconsider the variance taking into account the objections itemized by the Commission.</u></p> <p><u>(ii) The TGRA may seek reconsideration by submitting a request to the Chairman and members of the Commission.</u></p> <p><u>(iii) Upon receipt of a request for reconsideration, the Commission shall conduct an informal hearing with the TGRA within 30 days, which may be conducted in person or through the exchange of documents, as requested by the TGRA.</u></p> <p><u>(iv) After the informal hearing, the Commission must issue a written decision within 14 days. If the Commission disapproves the variance, such written decision must include an explanation of why the requested variance creates an imminent threat to the integrity of the tribal gaming</u></p>
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#### NIGC Comments and Questions regarding the TGWG Proposed Regulation (questions in blue).

##### Overall Comment

The development of a separate section for Class II gaming variances (543.18) rather than referring to 542.18 is an improvement over the Draft Proposal. However, the TGWG proposed § 543.18 does not provide the Commission with a process for meaningful review and assessment of variances approved by the individual TGRAs. [How could this be addressed?](#)

##### Tribal Gaming Regulatory Approval

*Effect of §542.18:* The existing text contains a clear criterion against which the TGRA is to evaluate the proposed variance to determine whether it is acceptable and warrants approval i.e. whether “the variance will achieve a level of control sufficient to accomplish the purpose of the standard it is to replace.”

*Effect of TGWG Proposal:* [Does deleting the criterion against which the TGRA is to evaluate the proposed variance increase the risk that the TGRA decision to approve or disapprove a given variance will be arbitrary and capricious?](#)

##### Reporting

*Effect of §542.18:* The existing text defines the content requirement of the submission. The required information is necessary for the Commission to determine whether the TGRA-approved variance satisfies the criterion for approval. For example, whether “the variance will achieve a level of control sufficient to accomplish the purpose of the standard it is to replace.”

*Effect of TGWG Proposal:* [The TGWG version deletes the submission requirements, mandating instead only that the TGRA “deliver a notice” to the Commission within ten days. What information should this “notice” include? Failure to specify what documents are to be submitted to the TGRA in the application for approval of a variance increases the risk of inconsistency in the approval decisions due to each decision being supported by different information. Does the TAC foresee a problem stemming from the fact that there is no required uniformity in information or documentation submitted to the TGRA? Could this lead to a lack of uniformity in what is then submitted to the Commission?](#)

##### Review by Chairman

*Effect of §542.18:* The existing text defines the circumstances under which the Chairman may object to the TGRA-approved variance and the relevant deadlines

*Effect of TGWG Proposal:* The amendment substitutes “the Commission” for “the Chairman” as the evaluator of the approval, reduces the time period provided for review from 60 to 30 days, and eliminates the possibility of extending the review period by mutual agreement. The proposed standard allows the Commission to disapprove the variance only in the event that a determination is made that said variance constitutes “an imminent threat to the integrity of the tribal gaming operation.” [Can the TAC foresee a situation in which a proposed variance, while not rising to the level of “an imminent threat to the integrity of the gaming operation,” may pose an increased albeit not imminent threat to the integrity of the gaming operation, an imminent or less than imminent threat to the finances or other component of the gaming operation or simply fail to meet the intent of the standard? Is the “imminent threat” language necessary?](#)

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Presumably a TGRA would not approve a variance that would constitute “an imminent threat to the integrity of the gaming operation.”

#### Curing Chairman’s Objections

*Effect of §542.18:* The existing text provides a method by which the TGRA may appeal a Commission decision not to concur with a TGRA approval of a variance.

*Effect of TGWG Proposal:* [Given the limited grounds for objecting to a variance under what circumstances will the appeal process be utilized?](#)

#### Effective Date of Variance

*Effect of §542.18:* The existing text provides guidance to the gaming operation regarding compliance with standards during the time period that a TGRA-approved variance is under review by the Commission.

*Effect of TGWG Proposal:* [How does a gaming operation proceed while a variance is under review?](#)

#### **TGWG Guidance**

The TGWG did not submit guidance for this proposed regulation.