Minnicoujou Itazipco

CHEYENNE RIVER SIOUX TRIBE

Siha Sapa 1868 Oohenumpa

P.O. Box 590
Eagle Butte, South Dakota 57625
(605) 964-4155
Fax: (605) 964-4151

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Via Electronic Mail Only--reg.review@nigc.gov
Ms. Tracie L. Stevens, Chairwoman
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

Re: Preliminary Discussion Draft of 25 C.F.R. Part 543: Class II MICS

Dear Chairwoman Stevens:

On behalf of the Cheyenne River Sioux Tribe and its members, the following comments are set forth apropos the National Indian Gaming Commission's (NIGC) discussion draft of 25 C.F.R. Part 543, which set forth the Minimum Internal Control Standards (MICS) for Class II gaming.

GENERAL COMMENTS

1. Revising the Discussion Draft's Prescriptive Approach to Regulation

Historically, one of the overriding Tribal concerns with the MICS has been their prescriptive and procedural approach dictating the specific manner in which a regulatory objective is to be achieved. Such an approach is ill-suited to the Tribal gaming industry in which technologies and industry practices are constantly changing and evolving. Among other problems, the specific requirements of prescriptive regulations may become difficult to justify over time as certain requirements become technologically obsolete. The enforcement of outdated regulations that are no longer compatible with industry practices can drive up compliance costs and ultimately hurt the tribe's bottom line by diverting tribal resources and time away from investments and innovation.

Despite repeated tribal government requests to scale back the prescriptive requirements in the Class II MICS, the proposed changes in the discussion draft fail to adequately resolve these

fundamental problems. Much like the Class III MICS and the Nevada Gaming Commission regulations on which it is based, the discussion draft consists largely of rigid and highly detailed procedural requirements. By locking in certain specifics such as the department, position title, and game play components, the discussion draft prevents tribes from considering more cost-effective and efficient procedures – even if such alternative procedures will ultimately result in the same desired outcome.

The discussion draft thus leaves little to no room for tribes to exercise flexibility in carrying out their regulatory responsibilities. The proper and most effective procedure for achieving compliance with Class II MICS can vary across gaming operations depending on the operation's structure, size, scope, and gaming floor layout. In addition, the technology-specific regulatory requirements in the discussion draft risk becoming quickly dated as new technologies and innovations become available. Because tribal gaming operations are diverse and complex and differ in terms of available resources, it is critical that tribes have the flexibility to develop and fine-tune their internal controls and processes based on their available resources and any changes in circumstances or technology.

In our view, a more balanced and flexible approach to the Class II MICS would be one that focuses on broader regulatory standards and objectives and describes the ends, as opposed to the means, of achieving compliance. Under such an approach, compliance would be measured by the extent to which the tribe has successfully achieved the stated regulatory standard objective, not the extent to which the tribe has followed the step-by-step procedures in the MICS. So long as the tribe's own procedures achieve a level of security and integrity sufficient to meet the stated regulatory standard in the MICS, the tribe should have the discretion to tailor their procedures based on the specifics of their particular gaming operation without falling out of compliance with the Class II MICS.

The content of the Class II MICS should thus be focused on providing adequate standards and objectives that tribes must meet in order to achieve MICS compliance. To that end, the detailed, procedural steps in the regulation should be removed and placed in guidance documents for use by tribes in developing their own controls and procedures. This way, the Class II MICS can focus on "what" needs to be achieved so that tribes can rely on their own internal controls and processes in determining "how" such compliance will be achieved.

Note that there are several benefits to using guidance documents rather than the regulation to describe specific procedures that tribes should follow to achieve compliance. First, the issuance detailed procedural requirements through guidance documents instead of the regulation gives the NIGC the flexibility to revise its procedures without having to undergo the full rulemaking process, which can become particularly useful in the tribal gaming context where technology and industry practices are constantly changing. Second, the use of guidance documents would be useful for those smaller tribes with fewer resources that may need more guidance in improving their own regulatory systems. And finally, a less prescriptive and more outcomes-based approach to the Class II MICS would bring the regulation closer to the purposes and goals of the Indian Gaming Regulatory Act (IGRA), which vests tribes with primary regulatory authority over their gaming activities and the NIGC with important oversight responsibilities.

2. Recognizing the Role of Tribal Governments as Primary Regulators

Section 543.3(a) of the discussion draft provides that tribal gaming regulatory agencies (TGRAs) may establish and implement additional controls since "TGRAs *also* regulate Class II gaming" (emphasis added). However, later in that same section, in § 543.3(h)(2), the discussion draft "recognize[es] that tribes are the primary regulator of their gaming operation(s)." In addition to being inconsistent, the first statement of the TGRA's regulatory authority runs contrary to the plain language in IGRA, which vests Indian tribes with "the exclusive right to regulate gaming activity on Indian lands." Moreover, § 2706(a)(2) of IGRA states that Class II gaming activities are under the jurisdiction of Indian tribes subject to certain provisions within IGRA. One of those provisions can be found in § 2706 of IGRA, which vests the NIGC with the specific authority to "monitor," not regulate Class II gaming.

Thus, under IGRA, Class II gaming comes within the primary regulatory authority of tribal governments, subject only to NIGC oversight, the parameters of which are set out in IGRA. The statement that TGRAs *also* regulate Class II gaming is therefore inaccurate and should be revised to mirror the language in § 543.3(h)(2) which recognizes tribes as primary regulators consistent with IGRA.

3. Adding Rules of Interpretation and Construction

The discussion draft is missing certain rules of interpretation and construction that are necessary to ascertain the proper meaning of specific provisions in the regulation. For instance, the discussion draft lacks an "Only Applicable Standards Apply" provision clarifying that Class II gaming systems will only be subject to those standards that are applicable to that particular gaming system. If a gaming operation does not offer lines of credit, then any standards governing lines of credit should not apply to that tribe's gaming operation.

The discussion draft would also benefit from the addition of a "No Limitation of Technology" provision. Without this provision, tribes are limited to using only that technology explicitly mentioned in the regulation in carrying out their regulatory responsibilities. Because the gaming industry is one in which technology is constantly evolving, the nature of the games regulated and the tools available to regulators are constantly evolving as well. As such, tribal regulators must be able to develop new policies and procedures to accommodate new technology as it becomes available. This provision should be included to ensure that the MICS are not interpreted to limit the use of technology or preclude the use of technology that is not specifically referenced.

And finally, the lack of a severability clause causes some concern because it opens up the possibility of having the entire set of Class II MICS overturned in the event that one of its provisions is held to be invalid, which we do not believe is what the NIGC intended by not including this provision.

4. Addressing Inconsistencies and Misplaced Provisions

The discussion draft suffers from serious organizational problems that should be remedied in order to eliminate duplication and confusion. Among other things, the discussion draft contains outdated terminology and inconsistent designations for persons responsible for carrying out the procedure that need to be replaced with more modern, clear, and concise terminology.

Based on our review of the discussion draft, it appears as though certain provisions were pulled from the various drafts produced by working groups and advisory committees in the past, and that as a result, many related controls are now scattered throughout the regulation in different sections. Controls should be reorganized to ensure that accountability and supervision is centralized and consistent. For instance, standards governing cage controls should be consolidated into one section that contains the cage controls for all games instead of being scattered throughout the regulation based on the game being regulated. Consolidating all related information into fewer sections will make it easier for tribes and gaming operations to reference and implement the regulatory standards set forth in the Class II MICS.

TECHNICAL COMMENTS

1. 25 C.F.R. § 543.2: Definitions

The discussion draft's definition of an "agent" is problematic because it does not support the use of a computer application in performing the functions of an agent. As defined, only individuals can qualify as an agent. Such a narrow definition of an agent can be impracticable under certain circumstances where more than one agent is required to be present. Furthermore, by narrowly defining agent to include only persons, the discussion draft prevents tribes from taking advantage of technological advances that may perform the functions of an agent in a more cost-effective and efficient manner.

2. 25 C.F.R. § 543.5: Use of an Alternate Control Standard

We are concerned by the lack of any guidance as to what constitutes an "alternate standard." Without a definition or explanation clarifying the elements of an alternate standard, any slight wording differences or minor procedural changes that do not alter the intent of the standard or the overall objective of the standard could be subject to the requirements in this section. We ask for clarity in either the form of a definition or in the preamble of the proposed rule to ensure that only those significant changes in intent and coverage will be considered an alternate control standard for purposes of this section.

3. 25 C.F.R. § 543.7 & § 543.8: Bingo Games

The discussion draft's distinction between "gaming system" bingo and "manual" bingo is an unprecedented and unnecessary departure from the well-accepted view and general consensus that "bingo is bingo." It is unclear why bingo is now being classified according to the technology being used when bingo has historically been treated as one type of gaming activity by both the NIGC and tribal governments. We are unaware of any events or incidents that may have prompted this new classification scheme or of any regulatory benefits of drawing such a distinction.

Among other problems, this unnecessary distinction between manual and gaming system bingo causes confusion and increases the risk of error and duplication. For instance, in § 543.8(e)(5)(ii), the regulation provides that "controls must include the number of agents required for authorization or signature for each predetermined level of payout," despite the fact that an earlier provision in the same section requires at least two agents to perform the validation and verification of a payout. Also, as drafted, the discussion draft contains several misplaced provisions that do not accurately reflect the type of bingo being conducted. For instance, §

543.8(e)(3)(iv)(B) requires payout records to include a description of the event, including any *player interface malfunction,* despite the fact that the requirements set forth in § 543.8 apply only to *manual* bingo, which does not involve any player interfaces.

Furthermore, some of the requirements for bingo games in both sections are impracticable or unnecessarily burdensome. For instance, § 543.7(d)(3)-(4) require that two agents be present to verify every bingo pattern before a payout in *gaming system* bingo. Since the discussion draft prohibits computer systems from serving as the agent for purposes of this regulation, this means that two employees must be present to validate and verify every win on a gaming system. While we can certainly understand the need to validate and verify hand-pays in manual bingo, such a requirement seems unnecessarily burdensome in the gaming system context.

We urge the NIGC to abandon this new regulatory approach to bingo in light of the foregoing concerns and to streamline the MICS requirements for bingo games by merging the two sections together.

4. 25 C.F.R. § 543.12: Gaming Promotions

To the extent that promotions are non-gaming activities, we believe that TGRAs should be responsible for establishing and enforcing proper standards to govern promotional activities. We therefore ask the NIGC to rely on guidance documents instead of the regulations in providing regulatory requirements for gaming promotion, which we believe gives due deference to TGRAs in regulating the conduct of gaming promotions.

5. 25 C.F.R. § 543.17: Drop and Count

To eliminate confusion and ensure adequate coverage for all drop and count controls, we recommend streamlining the drop and count standards into one section instead of separating them by department or game type. By separating out the requirements for card games from player interface and financial instruments in the discussion draft, certain provisions have become misplaced so that the functions required no longer correspond with what is being controlled. For instance, § 543.17(f)(8) prohibits posting rejected currency to a nonexistent interface, despite the fact that § 543.17 governs card games where interfaces are not used.

6. 25 C.F.R. § 543.18: Cage, Vault, Kiosk, Cash and Cash Equivalents

This section contains provisions for patron deposited funds and promotional payouts, drawings, and giveaway programs. To minimize confusion, these provisions should be covered in their respective sections instead of scattered throughout the regulation.

7. 25 C.F.R. § 543.23: Audit and Accounting

This section confuses the functions of independent accountants by requiring controls to ensure that each gaming operation "records journal entries prepared by the gaming operation and by its independent accountants." Journal entries, however, are not generally recorded by independent accountants. We ask that the "and" in this provision be replaced with an "or" to better reflect industry practices.

Also, § 543.23(c)(8) refers to "instances of non-compliance cited by internal audit, the independent accountant, and/or the *Commission*" (emphasis added). The term "Commission" should be replaced with "TGRA."

In closing, we thank you for the opportunity to share our views and concerns with the discussion draft of the Class II MICS and ask that you give favorable consideration to the issues and recommendations we have identified above.

Sincerely,

Kevin C. Keckler
Chairman