OFFICE OF THE GOVERNOR
The Chickasaw Nation
Post Office Box 1548 • Ada, Oklahoma 74821
(580) 436-2603 • Fax (580) 436-4287
http://www.chickasaw.net/~cnation

BILL ANOATUBBY
GOVERNOR

September 16, 2011

Ms. Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

Dear Commissioner Stevens:

Included with this letter are comments from the Chickasaw Nation on the National Indian Gaming Commission's (NIGC) Discussion Draft of 25 C.F.R., Part 518 – Self-Regulation of Class II Gaming. We are encouraged by the proposed changes contained in the Discussion Draft. In addition to the comments included with this letter, we urge the NIGC to establish a consultative mechanism, such as an advisory committee, to work on the revision of these regulations.

The NGIC is to be commended for its efforts to strengthen the government-to-government relationship with tribal governments. This opportunity for meaningful participation in the regulatory review process is appreciated. We look forward to continued cooperation and coordination with the NIGC on this important matter.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

Enclosure

cc: Ms. Steffani A. Cochran, Vice-Chairperson
Mr. Daniel Little, Associate Commissioner

COMMENTS OF THE CHICKASAW NATION ON THE NATIONAL INDIAN GAMING COMMISSION'S DISCUSSION DRAFT OF 25 C.F.R., PART 518 – SELF-REGULATION OF CLASS II GAMING

SEPTEMBER 16, 2011

The Chickasaw Nation appreciates the opportunity to provide the following comments on the Discussion Draft of 25 C.F.R. Part 518 – Self-Regulation of Class II Gaming. Congress enacted the Indian Gaming Regulatory Act (IGRA) and the self-regulation provisions contained therein at the height of the self-determination era in furtherance of its long-standing policies of promoting tribal economic development, tribal self-sufficiency, and strong tribal governance and self-determination. In fact, twelve days before the enactment of the IGRA, Congress enacted the 1988 amendments to the Indian Self-Determination Act, which among other things, strengthened the United States' commitment to the policy of self-determination and authorized the Self-Governance Demonstration Project, which became final law in 1994. The self-regulation provisions in the IGRA should thus be considered in light of the overall legislative direction set forth in the 1988 Indian Self-Determination Act and subsequent amendments, which eschewed paternalism towards tribal governments in favor of supporting the devolution of self-governing powers to the tribal level.

As a self-governance tribe, the Chickasaw Nation views the attainment of self-regulation status as a high priority and consistent with the federal government's self-determination policy and the IGRA's designation of tribal governments as the primary regulators of their gaming activities. Many tribal governments, however, have been reluctant to apply for self-regulation status because of the onerous petition requirements, the significant costs in maintaining such status, and the limited regulatory and oversight benefits under the current regulation. We appreciate the NIGC's willingness to take a fresh look at the self-regulation program and reshape it to result in greater benefits consistent with the IGRA and fundamental principles of tribal sovereignty.

We view the Discussion Draft as a significant improvement over the current regulation, but there are a few remaining issues that would benefit from further revision. We offer our comments in this regard in a positive spirit and in the belief that that a sound self-regulation program will inure to the benefit of tribal governments as well as the NIGC.

General Comments

A major flaw in the current regulations is the subjective nature of the criteria for the granting of a certificate of self-regulation; the extremely burdensome submission requirements; the onerous review process, and the lack of associated benefits. Furthermore, the current program places greater emphasis on the operations side of the equation than on the quality of the regulatory framework established by the tribal government. An effective self-regulation program should establish clear objective standards in a manner that encourages tribal participation and provides insight and guidance as to how such standards are achieved. The self-regulation program provides the NIGC an excellent opportunity to increase its own effectiveness and

efficiency by motivating tribal governments to invest in the development and implementation of strong, comprehensive regulatory frameworks upon which the NIGC may confidently rely to carry out the regulatory function with minimum oversight. In turn, this frees the NIGC to focus its limited resources on aiding those tribal governments needing greater assistance and oversight.

While the proposed revision certainly reduces some of the submission burdens, it does not adequately resolve all of the deficiencies in the current program. Moreover, the current regulation offers only a "thumbs up or down" style approach to the issuance of a certificate of self-regulation. We think this issue warrants the NIGC's attention. While we can certainly envision that a tribal governmental applicant may not have achieved the standard necessary for approval, we believe that a much more effective approach than simply issuing a denial would be for the NIGC to work with such tribal government over a set period to facilitate acceptance into the self-regulation program at a future time. The NIGC invests a great deal of resources into a highly detailed review for each applicant. If, at present, the NIGC determines that the tribal government has not met the standard, it denies the petition, either ending the matter or setting up an adversarial process of appeal. This approach accomplishes nothing of benefit to either the tribal applicant or the NIGC and represents a tremendous waste of time and resources. It corrodes the applicant's relationship with the NIGC and does nothing to advance the regulatory interests of either party.

If a tribal government is sufficiently motivated to seek a certificate of self-regulation, it stands to reason that it is sufficiently motivated to make the necessary improvements to secure the certificate ultimately. The self-regulation regulation should provide a roadmap for what constitutes a sound, effective regulatory framework, how to achieve it, and a means for any tribal government to succeed in obtaining it. It is illogical to conclude that the NIGC can provide greater or better oversight than a tribal gaming regulatory agency, particularly one that is adequately staffed and funded. Effective regulation requires strong, well-trained regulators engaging in daily monitoring and enforcement activities. The self-regulation program should be viewed and treated as a tool to aid both the NIGC and tribal governments in achieving the statutory goals established in the Indian Gaming Regulatory Act.

25 C.F.R. § 518.1

As previously referenced, the regulation should identify the standards and to be applied for the issuance of a certificate of self-regulation. In its current form the section refers only to the "requirements for obtaining" a certificate of self-regulation. The regulations should identify the standards and the submission requirements needed to establish that such standards have been met.

The second and third sentences should be moved to the next section addressing who may petition for a certificate of self regulation

25 C.F.R. § 518.2

This section should either be broken into two parts or the heading should be revised. We recommend leaving the heading and adding the second and third sentences from the previous

section then adding a new section entitled, "what is the eligibility requirement for applying for a certificate of self-regulation?" We would then recommend the following language:

> *What is the eligibility requirement for applying for a certificate of self-regulation?*
>
> *To be eligible to apply for a certificate of self-regulation, and applicant tribal government, for the three years period immediately preceding the date of its petition, must have, "conducted its gaming activities under the regulatory oversight of a tribal gaming regulatory agency with sufficient authority and resources to monitor compliance with and enforce the applicant's approved gaming ordinance and other applicable federal and tribal laws and regulations commensurate with the size, scope, and scale of the Tribal governments gaming operation."*

By liberalizing the eligibility requirements and focusing the relevant inquiry on the regulatory framework, more tribal governments will be encouraged to seek self-regulation status.

25 C.F.R. § 518.3

Although we appreciate that the proposed revision to § 518.3(a)(2) eliminate some of the more burdensome requirements by eliminating several submission requirements that are not directly related to the tribal government's capacity for self-regulation, this section requires the submission of documents that do not precisely sync with the criteria established in § 518.4, which establishes the criteria a tribal government must meet to receive a certificate of self-regulation. The order of the two sections should be reversed, so that the criteria are identified first.

We recommend that the NIGC to consider removing § 518.3(a)(2)(v), which requires submission of a list of current regulators and employees of the tribal regulatory body, along with their titles, employment dates, and expiration dates. While we agree that information about the structure and positions within the tribal regulatory body are relevant in evaluating a petition for self-regulation, we believe that the submission requirement of an organizational chart in § 518.3(a)(2)(ii) is sufficient in this regard. The NIGC is not and should not be in a position to evaluate the competence of individual staff members.

Second, § 518.3(a)(2)(vii) requires petitioning tribal governments to submit a list of gaming activity controls at the gaming operation(s). We believe this is an unnecessarily burdensome requirement given the breadth of internal controls applicable to tribal gaming operations, and we ask the NIGC to consider removing it from this regulation. While we appreciate the NIGC's efforts to minimize submission burdens by requiring a list as opposed to a manual of a tribal government's internal controls, we are concerned that listing all of the different internal controls may be equally burdensome for tribal governments. In any case, we question the benefits of requiring tribal governments to submit a listing of their internal controls and to what degree such information will assist the NIGC in evaluating the tribal government's eligibility for self-regulation. And third, we believe the facility license requirement in § 518.3(a)(2)(ix) is duplicative since the NIGC already has in its possession all newly issued or renewed facility licenses submitted by tribal governments pursuant to 25 C.F.R. § 559.4.

25 C.F.R. § 518.4

This section is intended to identify the showings that a tribal government must make to get a certificate of self-regulation and the criteria that the NIGC must use in issuing such a certificate. These criteria, however, are quite subjective – they use words and phrases such as "effective and honest," "reputation," "safe, fair, and honest operation," "generally free," "adequate systems," and "fiscally and economically sound." These subjective criteria give the NIGC tremendous flexibility in weighing a petition and deciding whether to approve it or not. These criteria also give the NIGC responsibility for assuring the criteria are met before it awards a certificate of self-regulation, and, through the NIGC's general rulemaking authority, it has asserted the power to ask for a lot of information to demonstrate that the criteria are met. Although the proposed revision eliminates certain specific agency functions from the list of factors that tribal governments can address to illustrate that it has met the criteria set forth in § 518.5(a), the basic deficiency remains. It provides no meaningful guidance as to what these terms actually mean nor does it constrain the agency's discretion with regard to its determination.

Without greater objectivity, the regulation provides no meaningful guidance as to how to meet the criteria. Moreover, this vagueness makes the program vulnerable to arbitrary and capricious decision making. In enacting law, Congress often leaves gaps for agencies to fill. This section is chock full of such gaps needing to be filled in a fair and reasonable manner. There is significant credible documentation already in the NIGC's possession to evidence whether or not these criteria are met objectively, specifically the annual independent financial audit, the annual MICS audits, and the suitability determinations submitted to the NIGC in relation to licensees.

The Chickasaw Nation supports those proposed changes to § 518.4(b), which eliminate eliminating the "public notice" requirement and some of the more egregious and irrelevant items, but the overall problem remains. For instance, while it has now become common practice for tribal regulatory agencies to license or permit vendors, there is no such mandate in the IGRA. We suggest removing references to vendor licenses in § § 518.4(b)(5)(ix) and 518.4(b)(5)(xii). The only licensing requirements under the IGRA are in relation to key employees and primary management officials. The inclusion of references to prosecutions should either be removed or amended to refer to referrals. Tribes lack authority to prosecute non-Indians, thus reference to "an adequate systems for prosecuting violations of its gaming ordinance is a misnomer." Tribal gaming regulatory agencies are civil enforcement agencies. They may sanction, but do not prosecute.

25 C.F.R. § 518.5

We were pleased that the Discussion Draft now includes a timeframe within which an initial determination has to be made by the Office of Self-Regulation. We would, however, like to suggest for the NIGC's consideration, shortening the timeframe from 120 days to 90 days. We believe 90 days is a reasonable amount of time to review a petition and resolve any

outstanding issues or concerns that the Office of Self-Regulation may have regarding the petition.

We would like to note that § 518.5(h) cross-references the appeals procedures in Part 585. Part 585, however, does not contain any language regarding self-regulation. We ask the NIGC to clearly state in 25 C.F.R. Part 585 that it will govern the appeals process for self-regulation claims brought pursuant to § 518.5(h).

25 C.F.R. § 518.7

The annual reporting requirement of the tribal government's usage of its net gaming revenues had a chilling effect on tribal governments interested in attaining self-regulation status. Rather than a benefit, we viewed this additional annual submission requirement as a penalty imposed only on self-regulating tribes. We therefore strongly support the proposed change to eliminate this requirement from this regulation.

We do not have any objections to amending this section to include only those two annual requirements under the IGRA. We do, however, question the overall benefits of requiring a complete résumé of *all* key employees and primary management officials hired and licensed by the tribal government for that year. We believe the scope of employees covered under this regulation is too broad and that the definition of "employee should be narrowed to include only those résumés of regulators and employees of the tribal regulatory body. Any NIGC concerns regarding key employees and primary management officials could be adequately addressed by reviewing the suitability determinations submitted by tribal governments pursuant to 25 C.F.R. Part 556.

25 C.F.R. § 518.9

The Chickasaw Nation is highly supportive of the NIGC's statement in § 518.9 that the NIGC's monitoring, inspection, and investigative powers will be inapplicable once a tribal government has received a certificate of self-regulation. For the Chickasaw Nation, the NIGC's retention of these powers has been one of the major deterrents to seeking self-regulation status. We strongly believe the proposed language in the Discussion Draft more closely comports with the IGRA and that it will encourage more tribal governments to take advantage of the statutory benefits of reduced federal oversight and regulation, as was intended under the IGRA.

Finally, we encourage the NIGC to consider adding a new section that would allow a petitioner which would otherwise be denied to work with the NIGC to attain a certificate of self-regulation. We believe that the NIGC could enter into an MOU or similar intergovernmental agreement with such petitioner's that would identify what would be required in order for the petitioner to achieve such status.

In closing, we commend the NGIC for its efforts to strengthen the government-to-government relationship with tribal governments. We are encouraged by the proposed changes contained in this Discussion Draft and urge the NIGC to establish a consultative mechanism, such as an advisory committee, to work on the revision of these regulations. We believe that the self regulation program could constitute an excellent mechanism for achieving the statutory

objectives set forth in IGRA, and we believe that the program could be substantially improved with input from tribal officials and regulators.