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BILL ANOATUBBY
GOVERNOR

August 15, 2012

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

Dear Chairwoman Stevens:

The Chickasaw Nation is pleased to submit the enclosed comments on the National Indian Gaming Commission's (NIGC) proposed rules implementing the Minimum Internal Control Standards (MICS) and Technical Standards for Class II gaming.

The Chickasaw Nation has long recognized the importance of MICS and Technical Standards in protecting the tribe's assets and the integrity of its Class II gaming activities. It is our hope that the enclosed comments on the Class II MICS and Technical Standards will be helpful in promulgating a more effective regulatory framework for Class II gaming that advances the Indian Gaming Regulatory Act's goals of promoting tribal economic development, tribal self-sufficiency, and strong tribal government.

Thank you for your consideration of the Chickasaw Nation's comments on this important matter. We look forward to continuing to work closely with the NIGC in the spirit of the government-to-government relationship and in accordance with federal law and policy.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

Enclosure

COMMENTS OF THE CHICKASAW NATION ON THE NATIONAL INDIAN GAMING COMMISSION'S DISCUSSION DRAFT OF 25 C.F.R. PART 543 – MINIMUM INTERNAL CONTROL STANDARDS FOR CLASS II GAMING

The Chickasaw Nation ("Nation") is pleased to submit the following comments in response to the National Indian Gaming Commission's ("NIGC") proposed rule implementing the Minimum Internal Control Standards ("MICS") for Class II gaming, which was published in the Federal Register on June 1, 2012. 77 Fed. Reg. 32444-32465 (June 1, 2012). The Nation appreciates the time and effort the NIGC has devoted to this regulatory review effort and sincerely hopes our comments will continue to inform and assist the NIGC in crafting the final regulations.

As an initial matter, the Nation would like to express its continuous support for the work of the Tribal Advisory Committees ("TACs") and the Tribal Gaming Working Group ("TGWG") in identifying issues and proposing recommendations that are feasible, practical, and consistent with industry practices. Given the breadth and complexity of the subject matter covered under this proposed rule, both the NIGC and tribal governments stand to gain from a more collaborative rulemaking approach that draws on the first-hand knowledge and expertise of tribal governments, operators, regulators, and industry representatives. The Nation hopes the NIGC will continue to give due consideration of the time and effort invested by TAC/TGWG members in drafting recommendations and alternative regulatory proposals for improving the overall effectiveness of the proposed Class II MICS.

In the comments below, we have provided detailed recommendations on a number of the provisions in the proposed rule. Before delving into the specific issues, however, we would like to offer some general comments on the broader issues underlying this proposed rule.

I. General Comments

A. Consider Alternative Regulatory Approaches that Reduce Burdens and Promote Greater Flexibility

The Nation observes that the proposed rule does not incorporate the alternative regulatory approach endorsed by the TACs and TGWG. Nonetheless, we continue to advocate for a less rigid and prescriptive regulatory approach and urge that the Class II MICS focus on what outcomes are required rather than on what specific steps must be followed. Such approach would provide tribal governments an important measure of flexibility in establishing efficient and cost-effective procedures that achieve the specified standards and outcomes established in the regulation. Such approach would also enable tribal governments to tailor their operational policies and procedures to the size, scale, and scope of the gaming operation in a manner consistent with the organizational structure of the gaming enterprise.

We do not question the importance of a robust system of internal controls. On the contrary, the Nation has adopted and enforces strict control standards because we understand the critical importance of a sound internal control structure in safeguarding the integrity of our gaming activities and the revenues they produce. Our concern is that an overly rigid federal regulatory framework promotes inefficiencies and can become quickly outdated, requiring frequent revision. A provision in a federal regulation that has become obsolete can have a highly negative impact on a tribal gaming operation by creating uncertainty about what is or is not required or permissible. A rule that specifies a particular security measure, for example, cannot be read to permit an alternative measure, even if the alternative would be more effective, less costly, and/or more appropriate under the circumstances.

It takes a significant investment of time and resources by both the NIGC and tribal governments to undertake regulatory reviews and revisions. The same is not true if the regulation is outcome-oriented and supplemented with agency guidance. Agency guidance may be very broad in nature or it may be quite narrow and specific. Either way, guidance documents are more amenable to revision, supplementation, and/or withdrawal because such revisions are not subject to the same timeframes and procedural processes that attend notice and comment rulemakings.

In the preamble to the proposed rule, the NIGC notes that it is reluctant to adopt this alternative regulatory approach because it "believes that the standards set forth in this part are both appropriate and sufficiently detailed to be implemented by tribes" (emphasis added). Without further elaboration, it is not clear from this statement that the agency fully appreciates our views and fundamental concerns with the proposed Class II MICS. We certainly agree that the standards in the proposed rule pertain to appropriate subject matter and contain detailed procedures, but the issue revolves around the conceptual distinction between a prescriptive approach and one that is outcome-oriented.

Procedures are not standards. Procedures instruct one as to a specific methodology for meeting a particular standard or regulatory objective. For instance, if the regulatory objective is to prevent theft of cash from the count room, the standard would be to implement internal control policies and procedures to prevent, detect, and deter theft during the count process, including provisions pertaining to: 1) supervision, 2) access, including key controls and authorization, 3) surveillance, 4) documentation, 5) counting process, 6) verification; 7) audit, and 8) etc.... This approach makes it clear as to the regulatory objective of the control standard and precisely what kind of procedures must be in place. It guides the operator in understanding the regulatory objective. The specifics of the procedures may then be developed by the gaming enterprise and tailored to correspond with the particular gaming operation, subject to review and approval by the tribal gaming regulatory agency. By illustration, a gaming operation that uses an automated key control system is going to have very different procedures than one which does not. Both, however, are responsible for establishing internal control procedures specific to each control standard and each procedure, in turn, may then be monitored and audited as appropriate.

Pursuant to Executive Order 12866 and President Obama's Executive Order 13563 of January 18, 2011, federal agencies are responsible for identifying and assessing available alternatives to direct regulation and, in choosing among alternative regulatory approaches, selecting those approaches that maximize net benefits. It is unclear from the preamble of the proposed rule that the alternative approach has been adequately assessed. The TAC, TGWG, and many tribal governments have invested an immense amount of time and resources in developing the approach, even going so far as providing a draft regulation, proposed guidance document, and an extensive explanation. Such effort should not be dismissed lightly: it merits at least due consideration of the net benefits associated with this alternative approach.

In comparing the proposed rule and the alternative regulatory approach, the benefits of the alternative approach become evident. Under it, tribal governments can tailor their procedures to best fit their operational and regulatory needs and circumstances. In contrast, by freezing certain specifics such as job descriptions and game components, the proposed rule makes it substantially more difficult for tribal governments to integrate new technology and management improvements.

As the NIGC works towards finalizing this proposed rule, we respectfully request that it reconsider whether the prescriptive regulatory approach taken in the proposed rule is the appropriate choice or whether an alternative regulatory approach that focuses on regulatory standards rather than detailed procedures will ultimately be more effective and less burdensome to implement.

B. Clarify That Regulations Are Not Intended to Impose a Particular Organizational Structure.

The fundamental problem with overly prescriptive regulations is the assumption that a particular organizational structure will be suitable for all regulated individuals and entities, regardless of any differences in available resources or capacity. While we do not perceive the NIGC's intent as requiring all tribal governments to maintain a particular organizational structure, there are provisions in the proposed rule that may inadvertently require a particular organizational structure as a matter of compliance. For instance, it appears that proposed § 543.24 assigns certain functions to "revenue audit," despite the fact that such functions are not normally performed by the revenue audit department. We are concerned by the implication that a tribal government will be deemed non-compliant if it assigns these audit functions to another independent department.

The purpose of the Class II MICS is not to require a particular organizational structure but rather to provide minimum internal control standards for the conduct of Class II gaming. As long as the required standards are met with an appropriate segregation of functions and independence, the title of the individual or department carrying out the assigned tasks should not be material for compliance purposes. We further note that many tribal gaming facilities have been operating for decades and in many instances have developed terminology peculiar to the operation. To maximize compliance it is important that employees readily understand the content of an operation's internal control policies and procedures. If, for example, one facility uses

the term "vault" while another uses the term "main bank" in referring to the area where cash is secured, it should not present a compliance issue to use either term in a tribal government's internal control policies and procedures.

For these reasons, the Nation respectfully requests that the NIGC include a statement in either the preamble or, preferably, the text of the final rule clarifying that the regulations are not intended to impose a particular organizational structure on tribal gaming operations or to limit the use alternative terminology so long as the control standard is met. Such a disclaimer would assure tribal governments have the necessary flexibility and discretion to incorporate local vernacular into its policies and procedures and determine the most appropriate management and organizational structure for complying with the Class II MICS requirements.

C. State Regulatory Requirements as Clearly, Concisely, and Consistently As Possible

As a general rule, regulations are most effective when they are drafted in a user-friendly manner that is both easy to understand and apply. Indeed, Executive Order 12866 instructs federal agencies to "draft its regulation to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from using uncertainty."

The Nation acknowledges the challenges of drafting a comprehensive set of regulations that identifies and addresses all of the areas in which integrity and security risks may arise. We would like to note, however, that a lengthy regulation does not necessarily mean a better or more effective regulation. Given the volume and complexity of the requirements in the proposed rule, all requirements should be stated in the most concise and simple manner possible for ease of interpretation and implementation. Additionally, to the extent possible, any related processes should be consolidated and streamlined to avoid the potential for duplication and confusion. Maintaining separate sections for similar controls and functions needlessly adds length to the regulation and makes the requirements more difficult to comprehend and apply.

A high degree of consistency is also key to ensuring that regulations are simple and easy to understand. Consistency minimizes the potential for uncertainty and promotes greater predictability and fairness, particularly in the context of complex regulations such as the MICS, which set forth minimum standards for approximately thirteen different subjects relating to Class II gaming. In reviewing the proposed rule, we observed inconsistencies in the regulatory approach taken in certain sections. Specifically, we noticed that in some sections, the NIGC took a more prescriptive approach by focusing on detailed steps, while in others, applied a lighter touch with an emphasis on minimum, baseline standards.

As an example, proposed § 534.15 addresses control standards for lines of credit and broadly outlines only those issues that must be covered in the controls established by the tribal government. In contrast, the drop and count standards in proposed § 543.17 prescribe not only the specific content that must be included in the controls, but the specific tasks that must be carried out by designated individuals and departments. This

unevenness in the level of detail occurs throughout the proposed rule and should be addressed. We urge that the agency review the format contained in § 543.15 of this proposed rule and employ the same model in the other sections.

D. Provide Consistent Terminology Throughout the Regulation

While reviewing the proposed rule, we came across several instances where different terms were used to describe the same thing/person without any guidance on whether the NIGC intended any distinction between the different terms. The use of inconsistent terminology increases the potential for misinterpretation and misapplication of the requirements. As noted in the general comment above, consistency helps to ensure that regulations are clear, simple, and easy to implement.

The Nation urges the NIGC to carefully review the proposed rule and address any instances of inconsistent terminology. To assist the NIGC in this endeavor, we have provided some examples of terms that should be revised to avoid any potential confusion that might arise from the appearance of inconsistent terminology within the proposed rule:

- Replace "customer" references with "patrons."
- Replace "employee" references with "agent."
- Replace "cashiers department" references with "cage/vault/bank."
- Replace "server," "server-based," and "technologic aids to the play of bingo" references with "Class II Gaming System.
- Remove the word "authorized" before "agents" since agents must be authorized by definition.

E. Defer to Tribal Gaming Regulatory Agency Rulemaking Authority

As the primary regulators of tribal gaming, tribal gaming regulatory agencies not only have greater insights into the day-to-day activities, but they also typically possess broader statutory authority in relation to their regulatory functions than that which was delegated by Congress to the NIGC. In areas where the scope of NIGC rulemaking authority could potentially be challenged, such as in relation to promotions, lines of credit, and player tracking systems, the likelihood of such potential challenge would be diminished considerably if the proposed rule were less prescriptive and provided for deference to the rulemaking authority of tribal gaming regulatory agencies.

With these general comments in mind, we now turn to our comments on specific elements of the proposed rule.

II. Specific Comments

A. 25 C.F.R. § 543.2: Definitions

Cashless Transaction.

The Nation recommends adding a definition of a "cashless transaction" that reads as follows:

A movement of funds electronically from one component to another, often to or from a patron deposit account or promotional account.

While the proposed rule defines a cashless system as "[a] system that performs cashless transactions and maintains records of those cashless transactions," it does not provide any guidance as to what is meant by the term "cashless transaction." We believe a definition of a cashless transaction is necessary to clarify the term "Cashless system," as defined in § 543.2 and used in proposed § 543.13.

Complimentary Items.

Although the proposed rule provides some guidance as to the meaning of a complimentary item in proposed § 543.13(b), we believe this term should be further clarified through the addition of a regulatory definition in § 543.2. A clear and unambiguous regulatory definition of a complimentary item would not only help distinguish complimentary items from ordinary business expenses and employee incentives, but it would also help ensure the proper accounting treatment of expenditures associated with complimentary items. The Nation suggests the following definition for the NIGC's consideration:

Complimentary services and items.

Services and items are provided to a patron at the discretion of an agent on behalf of the gaming operation, or by a third party on behalf of the gaming operation. Complimentary services and items may include, but are not limited to, travel, lodging, food, beverages, or entertainment expenses.

Kiosk.

The proposed definition of a kiosk is unnecessarily narrow and should be expanded to encompass kiosks more generally, not just those providing the specific functions listed in the definition. The revised definition should describe the general function of kiosks – i.e., enabling a patron of a Class II gaming operation to interact with systems and/or process transactions without the assistance of an agent – and exclude any potentially limiting language regarding its specific functions.

Surveillance operation room(s); Surveillance system.

It is unclear why the definitions of a surveillance operation room and surveillance system have been added to the proposed rule and how these definitions will benefit the proposed rule. A new regulatory definition should only be added if the definition will somehow benefit the regulation or bring greater clarity to an otherwise ambiguous provision. In light of the rapid speed at which technology changes in the gaming industry, the Nation is concerned that the inclusion of definitions for these two

surveillance terms may inadvertently limit the technology and functionality of a surveillance system. For instance, the definition of a "surveillance system" unnecessarily includes equipment such as video cameras and video printers, both of which may have been replaced by more modern or updated technology. Moreover, the terms are common and their ordinary meaning is well-established and readily understood throughout the industry.

B. 25 C.F.R. § 543.3: How Do Tribal Governments Comply With This Part

Severability Clause.

The NIGC did not include a severability clause in the proposed rule on the basis "that the regulations are not so intertwined" to the extent that the striking of one provision "would necessarily always require invalidation of the entire part." The NIGC cites to several cases in support of its view that severability clauses are not conclusive, and explains that "the lack of a severability clause will not compel a court's finding on the issue."

While the absence of a severability clause, in and of itself, may not necessarily preclude severability, we note that its omission is not entirely immaterial. In determining whether a provision is severable, courts may look to the agency's intent in drafting the regulation. The fact that the NIGC included a severability clause in the Class II Technical Standards, but not in the Class II MICS, could raise the presumption that the NIGC acted intentionally and purposefully in excluding the severability clause from the Class II MICS. Courts would likely interpret such an omission in the Class II MICS as an indication that the agency did intend for the invalidation of one provision to invalidate the entire part. We believe that the inclusion of a severability clause in the Class II MICS would provide greater clarity and eliminate any possibility of such an outcome.

§ 543.3(e) Limitations on Technology.

The NIGC has declined to include a "No Limitation of Technology" provision in the proposed rule on the basis that "such a provision is properly located in the technical standards rather than control standards." The ability to use different technologies, however, is fundamental to the efficacy of the Class II MICS, as reflected by the NIGC's statement in the preamble that the MICS "require periodic review and updates to keep pace with technology." Any limitations on technology, whether in the operational or regulatory contexts, risk placing the tribal gaming industry at a competitive disadvantage relative to non-tribal gaming operations, such as New Jersey casinos, whose policymakers have rescinded the MICS requirements in favor of greater regulatory flexibility.

As an alternative to adding a "No Limitations of Technology" provision, we suggest amending proposed § 543.3(e) as follows:

(e) Computer applications.

For any computer applications and/or other technologies utilized, alternate documentation and/or procedures that provide at least the level of control established by the standards of this part, as approved in writing by the TGRA, will be acceptable.

This change would assure tribal governments that the Class II MICS are not intended to limit the use of technology or preclude the use of technology not specifically referenced, but would require tribal governments to revise their policies and procedures to accommodate the specifications of any new technologies being used. We ask that the NIGC reconsider its decision to exclude this interpretive provision so that the regulations encourage, rather than impede, a tribal government's ability to take advantage of new technologies and innovations. We believe that the recommended language will operate to provide clarity and meet the regulatory objective of ensuring that proper policies and procedures are established.

§ 543.3(h)(2) Recognizing the Primary Regulatory Authority of Tribes.

Section 543.3(h)(2) of the discussion draft preceding the publication of the proposed rule properly recognized the role of tribal governments as the primary regulators of their gaming activities through the following statement: "Recognizing that tribes are the primary regulator of their gaming operation(s) . . . ." However, this statement has been removed from the proposed rule without any explanation from the NIGC. Recognition of tribal gaming regulatory agencies ("TGRA") as primary regulators is consistent with the IGRA, which expressly vests tribal governments with the exclusive authority to regulate gaming on Indian lands. In including this language, Congress made clear its intent to vest tribal governments with primary regulatory authority and the NIGC with more limited oversight functions. The NIGC has not previously found the inclusion of such language in its regulations to be objectionable. We ask the NIGC to reinstate its explicit statement regarding the primary regulatory authority of TGRAs, which sends a positive message to Indian Country and advances the regulatory framework established under the IGRA.

§ 543.3(h)(2) Enforcement of the Commission MICS.

Proposed § 543.3(h)(2) states that the NIGC will first inform the tribal government and the TGRA of any deficiencies in the SICS before taking any enforcement actions. The Nation fully supports the clarification that notice and an opportunity to cure will be provided before the NIGC initiates an official enforcement action against a tribal government. The Nation, however, is concerned by the possibility of using deficiencies in the SICS, rather than in the TICS, as a basis for an enforcement action. The SICS, which are operational in nature do not normally form the basis of the agreed upon procedures ("AUP") audits. AUP audits are typically based on the MICS and/or TICS, which are regulatory in nature. This language could inadvertently prompt operations to issue less comprehensive or detailed SICS to avert a potential federal enforcement action for having imposed upon itself higher standards than are strictly required by federal and tribal regulations. The establishment of higher standards in SICS should not be discouraged. Moreover, SICS are monitored by TGRAs and a tribal government can elect to specify that the AUP audit be based on its SICS rather than its TICS should it so desire.

C. 25 C.F.R. § 543.8: Bingo

§ 543.8(c)(4) Server Based Bingo Card Sales.

While it is important to establish sufficient control standards for the sale of Class II gaming system bingo cards, it is equally important that such standards be drafted in a manner that accurately reflects the nature of the game being played. Proposed § 543.8(c)(4) requires tribal governments to "record, track, and reconcile" the sales of Class II gaming system bingo cards, or in other words, monitor and control the inventory of bingo cards sold. There is, however, no "inventory" to control with respect to Class II gaming systems as there is with physical cards in manual bingo, so any requirement to track bingo card sales is incompatible with the nature of Class II gaming systems. The requirement to "track and reconcile" should thus be removed from this section or be limited to physical inventory of bingo cards.

With respect to the information that must be documented from the server, there are several requirements that are potentially inconsistent with the technical standards in 25 C.F.R. Part 547 that relate to bingo card sales. Specifically, the requirement that the Class II gaming system keep track of the "number of bingo cards sold," and the requirement that the tribal government must note the "system limitation" of a system that does not track the number of cards sold, suggests that such function is a requirement somewhere in the Class II MICS or the Class II Technical Standards when it is not. Per proposed 25 C.F.R. § 547.9(a), only the "amount in" and "amount out" must be maintained by the Class II gaming system. Thus, as drafted, it appears as though this section is establishing additional technical standards outside of the requirements in 25 C.F.R. Part 547, which presumably contains all of the applicable technical standards for Class II gaming systems.

To maintain consistency with the Class II Technical Standards and eliminate any unnecessary and conflicting requirements, we request that the following changes be incorporated into the final rule:

(4) ~~Server Based~~ Bingo card sales: Class II Gaming Systems . ~~In order to adequately~~
~~r~~record~~, track and reconcile~~ Record sales of bingo cards ~~, the following information must~~
~~be documented~~ from the Class II gaming system, including the following: ~~server~~:
(i) Date;
~~(ii) Shift or session;~~
~~(iii) Number of bingo cards sold (this is not required if the system does not track cards sold, but system limitation must be noted);~~
(iv) Dollar amount in ~~of bingo card sales~~; and
(v) Dollar amount out. ~~Amount in, amount out and other associated meter information;~~

§ 543.8(d) Draw.

The Nation appreciates the NIGC's decision to remove the regulatory distinction between "manual bingo" and "Class II gaming system bingo" and consolidate the controls for bingo into one section. Among other benefits, this proposed change minimizes the potential for confusion and duplication. Nonetheless, there are a few remaining issues in the bingo section of the proposed rule that we believe warrant further clarification or revision.

In proposed § 543.8(d), we believe the controls pertaining to the draw can be further consolidated and simplified without compromising or diminishing the level of security and integrity in the controls. As drafted, this section is duplicative and creates an unnecessary separation of controls for manual draw and "server-based draw" in proposed § 543.8(d)(2)-(4).
By and large, the controls for draw in bingo are similar regardless of whether the game is conducted manually or through a gaming system. The only material difference is that Class II gaming systems are also subject to the technical standards in 25 C.F.R. Part 547. The draw requirements should thus not be distinguished based on the technology being used but rather stated generally to apply to all bingo games.

Also, there are two references to the Class II Technical Standards in proposed § 543.8(d), both of which state that "[c]ertification in accordance with 25 C.F.R Part 547 is acceptable for verifying the randomness of the draw." The purpose of the controls in proposed § 543.8(d), however, is not to verify the randomness of the draw, but rather to ensure that all eligible objects are available and have not been damaged or altered, and that the identity of objects drawn is properly recorded and transmitted to the patron. There are no prior references to verifying randomness, and in any event, the agents responsible for verifying the object would not necessarily have the ability to verify randomness. We therefore recommend modifying proposed § 543.8(d)(1)(ii) and § 543.8(d)(4)(iii) as follows to help clarify the intent and purpose of the draw controls:

> Certification in accordance with 25 CFR part 547 is acceptable for ~~verifying the randomness of the draw~~ meeting this control.

§ 543.8(e)(5) Manual Prize Payouts.

The Nation agrees that all manual payouts must be authorized and signed by two agents. We are concerned, however, that requiring all manual payouts to also be witnessed by two agents may be overly burdensome and onerous, especially for those smaller gaming operations with fewer resources. Furthermore, the witness requirement may not be as critical for smaller payouts that do not trigger the same risks as higher payouts. There are many mundane reasons that may prompt a manual payout of very small amounts such as a power outage, a paper jam, and so on. Requiring two agents

for a hand pay of a small amount. We believe these issues could be adequately addressed by revising proposed § 543.8(e)(5)(i) to read as follows:

> (5)Authorization and signatures. (i) At least two agents must authorize, sign, and, ~~witness~~ for all manual prize payouts that meet a predetermined threshold established by management and approved by the TGRA, witness the payout to the patron.

§ 543.8(e)(6)(iv)(D) Overrides

This section requires an agent to compare the amount of the prize at the player interface to the accounting system amount for manual payouts and document any necessary overrides. In practice, however, agents responsible for making manual payouts generally do not have access to the accounting system. We are concerned that this requirement may federally mandate procedures and accounting system access by agents who are not normally authorized such access and in a manner inconsistent with best industry practices. Tribal governments should have the flexibility to determine the extent to which certain agents will have access to their accounting systems. We therefore respectfully request that the NIGC either remove this requirement in the final rule or revise the provision to address the concern presented.

§ 543.8(g)(1) Shipping and Receiving

As a general matter, the Nation believes that the shipping and receiving requirements in this proposed section should be stated as broadly and generically as possible so as to maximize the flexibility of TGRAs in establishing their own procedures. For instance, rather than requiring notification of pending shipment from the gaming operation to the TGRA, the regulation should state generally that notice must be provided to the TGRA in accordance with its procedures and requirements. Such change would allow notice to be given by either the gaming operation or the supplier, depending on how these matters are typically handled by a particular TGRA.

In addition, we ask that proposed § 543.8(g)(1)(i)(B) be struck from the proposed rule on the basis that mandating certification and TGRA approval prior to shipment may restrict the TGRA's ability to test, review, examine, and conduct trial runs of the gaming products. Certification and approval is already required under the Class II Technical Standards; the Class II MICS should not mandate *when* such certification and approval takes place, especially if the timing requirement potentially places limitations on the TGRA's ability to carry out its regulatory functions pursuant to 25 C.F.R. Part 547.

§ 543.8(g)(5) Testing

This section requires that testing of certain components and functions "be completed during the installation process to verify that the player interface has been properly installed." Typically, by the time a gaming product is ready for installation, the product has already been tested, certified, and approved by an independent testing laboratory pursuant to the Class II Technical Standards. Depending on the circumstances, the TGRA's functions may range from verifying testing reports to conducting additional testing. The Nation is concerned that the inclusion of these testing requirements may mandate procedures that are unnecessary or inconsistent with industry practices without any regulatory benefit.

Furthermore, the intent and purpose of this section is to ensure the proper installation of player interfaces, not to set forth testing requirements that are already addressed under the Class II Technical Standards. Any additional testing of player interfaces that is not already required in the Class II Technical Standards should be within the discretion of the TGRA. We therefore respectfully request that the testing requirements set out in proposed § 543.8(g)(5)(i)(A)-(K) be removed from the proposed rule and that proposed § 543.8(g)(5)(i) be modified as follows:

(5) ~~Testing~~ Installation.
(i) Procedures must be established for ~~Testing must be completed during~~ the installation of Class II gaming systems ~~process to verify that the player interface has been properly installed~~. These procedures must address applicable testing requirements. ~~This must include testing of the following, as applicable:~~
~~(A) Communication with the Class II gaming system;~~
~~(B) Communication with the accounting system;~~
~~(C) Communication with the player tracking system;~~
~~(D) Currency and vouchers to bill acceptor;~~
~~(E) Voucher printing;~~
~~(F) Meter incrementation;~~
~~(G) Pay table, for verification;~~
~~(H) Player interface denomination, for verification;~~
~~(I) All buttons, to ensure that all are operational and programmed appropriately;~~
~~(J) System components, to ensure that they are safely installed at location; and~~
~~(K) Locks, to ensure that they are secure and functioning.~~

§ 543.8(h) Operations

The Nation is deeply concerned with the requirements contained in this section, which dictate the specific procedures that must be implemented in relation to malfunctions and the removal, retirement and/or destruction of Class II gaming systems and equipment. In the event that a gaming machine or component malfunctions or needs to be removed from the gaming floor, there are many variables to consider, including

interference with any contractual obligations with the supplier(s). The proper response to such an event should not be mandated by federal law as it would be virtually impossible to capture all of the possible scenarios in the regulation.

In the Nation's view, the only requirement that should be federally mandated with respect to malfunctions is that procedures must be implemented to investigate, document, and resolve malfunctions. All other requirements should be addressed at the operational level, not in the federal regulations. As for requirements related to the removal, retirement and/or destruction of gaming systems and equipment, the regulation should require only the following procedures: final accounting information, verification and recording of unique identifiers and descriptions of removed/retired components, and documentation of the disposition of removed/retired Class II gaming system components. As is the case with malfunctions, all other specific requirements would be more appropriately addressed at the operational level on a case-by-case basis.

D. 25 C.F.R. § 543.10(g) Promotional Progressive Pots and Pools

The Nation is concerned that, as drafted, this section may inadvertently cover gaming activities that are outside the intended scope of this section. To ensure that the controls in this section apply to only those types of Class II gaming activities contemplated in the definition of a "Promotional progressive pots and/or pools" in this proposed rule, we ask that all generic references to pots, pools, and funds be amended to specify that such terms are only applicable in the promotional progressive pots and/or pools context. We also request that the term "and any other promotion, including related drawings and giveaway programs" be removed from this section to avoid any confusion regarding the narrow applicability of this section to promotional progressive pots and/or pools, as that term is defined in proposed § 543.2.

E. 25 C.F.R. § 543.12 Gaming Promotions and Player Tracking Systems

In the preamble, the NIGC states that player tracking and gaming promotions relate to gaming activities and thus fall within the scope of the NIGC's authority. While we understand the potential integrity and security risks associated with player tracking systems and gaming promotions, we believe that the regulation of such functions should be within the discretion of tribal governments who have developed the necessary expertise, resources, and capacity for overseeing the regulation of player tracking and gaming promotions.

Under IGRA, the NIGC's primary mission is to regulate gaming activities for purposes of shielding tribal governments from organized crime and other corrupting influences; ensure that tribal governments are the primary beneficiaries of gaming revenue; and assure that gaming is conducted fairly and honestly by both operators and patrons. We are concerned that the NIGC may be straying from its primary mission by proposing to mandate by federal regulation the specific requirements for player tracking systems and gaming promotions, neither of which necessarily entail gaming activities. We therefore respectfully request that the NIGC amend the final rule to reflect the role of tribal gaming regulatory agencies in regulating and overseeing activities related to player tracking and gaming promotions.

F. 25 C.F.R. § 543.13 Complimentary Services or Items

Proposed § 543.13(c)(4) states that the authorization, issuance, and tracking of complimentary services or items must be documented and recorded. Gaming operations, however, typically do not "track" complimentary services or items; rather they document the issuance of those services and record items that are redeemed by patrons. As drafted, the requirement to track complimentary services and items is confusing. It is not clear if tracking refers to maintaining an inventory of items distributed or the maintenance of a log or something else entirely. Moreover, use of the term "tracking" could be construed to require that any giveaway of items must be fully documented, which is appropriate at a certain threshold, but illogical at de minimus levels. Promotional giveaways of inexpensive items, such as sodas, lanyards, pens, plastic cups, etc. are common practices at tribal gaming facilities. Accounting records for purchases of these types of items certainly exist and inventories are maintained, but it would not be practical to have to fully document down to the name of the recipients of every distribution of these inexpensive types of "complimentary" items. We suggest substituting the term "redemption" for the term "tracking," and believe that this proposed change will eliminate any confusion about what it required by this control.

G. 25 C.F.R. § 543.17 Drop Boxes vs Financial Instrument Storage Component

In the preamble, the NIGC states that using the terms "drop box" and "financial instrument storage component" universally could potentially cause confusion since the terms are used by the gaming industry to refer to either card games or player interfaces, respectively. The Nation disagrees and does not believe that a regulatory distinction should be drawn between the two terms. The term "financial instrument storage component" is specific to 25 C.F.R. Part 573, and was used in the context of the technical standards to ensure that no variations of drop box would be excluded from coverage. There was no intent to draw a regulatory distinction between the boxes used for player interfaces and the boxes used for card games.

Also, by distinguishing between card game drop boxes and player interface drop boxes in this manner, the proposed rule appears to suggest that drop boxes are only used in those two specific circumstances, when in practice, drop boxes are used and drops performed in several other contexts, such as with ATMs and kiosks. To improve the readability, usability, and understandability of the regulation, we recommend using the term "drop box" as the universal term to describe any container in which cash or cash equivalents are stored.

§ 534.17(g)(7)(ii) Currency Counter Interfaces

This provision identifies two specific technologies that must be utilized to satisfy the requisite control without anticipating the use of other technologies that are capable of achieving the same level of security and integrity. Specifically, it requires currency drop figures to be "transferred via direct communications line or computer storage media to the accounting department." A description of the specific technology that must be utilized to carry out this function may result in tribal governments making unnecessary

investments in those technologies, even if they already possess functionally equivalent technology or are capable of acquiring a more cost-effective option. The principal purpose of this requirement is to ensure that the current drop figures are transferred to the accounting department whenever a currency counter interface is used. So long as this purpose is fulfilled, it should not matter how or in what fashion such figures are transferred to the accounting department.

H. 25 C.F.R. § 543.18(f) Patron Deposited Funds

The controls for safekeeping funds should not be confused with those applicable to patron deposited funds. Safekeeping funds are funds secured temporarily at the patron's request that are not used for wagering purposes. The gaming operation holds such funds in its deposit box and upon the patron's request, returns to the patron the deposited funds in the same form and amount. In contrast, the sole function of patron deposited funds is to hold funds for the patron to draw up on for wagering purposes. Given the different purposes for which safekeeping and patron deposited funds are established, we believe that they should be subject to different requirements and controls.

I. 25 C.F.R. § 543.20 Information Technology

Requirements that are specific to the Class II Technical Standards should not be incorporated into the Class II MICS. Proposed § 543.20(m) states that "Following download of any game software, the Class II gaming system must verify the downloaded software using a software signature verification method." The procedures for the verification of downloaded software, however, are the type of functions that are covered under the Class II Technical Standards. However, signature verification at installation is typically carried out by TGRA or compliance agents pursuant to established installation policies and procedures. Commingling the requirements only increases the potential for conflict and can cause serious problems in terms of implementation. The verification requirement quoted above should therefore be removed from this section.

J. 25 C.F.R. § 543.24 Revenue Audit

The title of this section, "What are the minimum internal control standards for revenue audit" suggests that this section applies to functions conducted within the revenue audit department and that agents working within the revenue audit department will be responsible for performing the requisite functions. Such an interpretation is misleading and potentially confusing because some of the functions required in this section are not typically handled by revenue audit employees. Revenue audit employees typically perform tasks that are narrowly related to the daily review of records and reports. They are generally not responsible for most of the functions listed in this section, such as investigating variances, reviewing player tracking systems for accuracy, or performing unannounced currency counter tests. These functions are typically performed by other and often higher level agents.

As an alternative, the NIGC could rename this section "Operational Audits," to clarify that that these audits are conducted at the operational level, and that the subject

matter of the audits involves operational considerations generally, not revenue audit considerations specifically. This change would provide tribal governments the necessary flexibility to assign functions to any appropriate department so long as the assignment does not compromise the integrity of the function and all duties are properly segregated with sufficient independence.

III. Conclusion

The Nation has long recognized the importance of minimum internal controls standards in protecting the security and integrity of tribal gaming activities. We seek a rule that reflects a balance between the goals of promoting security and integrity and ensuring that tribal governments have the necessary flexibility to develop internal procedures that are appropriate to the size, staffing level, and organization of their gaming facilities. It is our hope that the final rule will resolve this fundamental issue in a manner that supports the role of tribal governments as the primary regulators of their gaming activities.

In closing, we would like to express our appreciation for the immense effort the NIGC has invested in this rulemaking process. We particularly commend the NIGC for its broad outreach effort and hope that you will find our comments helpful as you proceed with your final deliberations in relation to this important endeavor.

COMMENTS OF THE CHICKASAW NATION ON THE NATIONAL INDIAN GAMING COMMISSION'S DISCUSSION DRAFT OF 25 C.F.R. PART 547 – TECHNICAL STANDARDS FOR CLASS II GAMING

The Chickasaw Nation ("Nation") is pleased to submit the following comments on the National Indian Gaming Commission's ("NIGC") Proposed Rule implementing the Class II Technical Standards, which was published in the *Federal Register* on June 1, 2012. 77 Fed. Reg. 32465-32481 (June 1, 2012). First, the Nation would like to commend the NIGC for undertaking a comprehensive regulatory review as well as for its willingness to reach out and engage with tribal governmental officials through a variety of consultative activities. We recognize that the NIGC's extensive travel schedule over the past couple of years must have posed a degree of personal hardship on the members and staff, and we wish to both recognize and extend our sincere appreciation for the time and effort that has been devoted to this process.

Without question, the revenue from the Nation's gaming activities is critical to the health and well-being of the Chickasaw Nation. These dollars enable the Nation to take care of its elders, educate its children, attend to the health and welfare of our people, and improve the overall quality of life not only for the Chickasaws citizenry, but for the community at large as well. Thanks to the income we derive from gaming, we are able to help those in need, employ the able-bodied, and create economic opportunities that would not otherwise be available without the successes we have achieved in the gaming arena. These are the interests that are served by our gaming activities and impel us to pay particular attention to anything that does or could affect them.

Until 2004, when the State of Oklahoma agreed to enter into Class III gaming compacts with tribal governments in Oklahoma, Class II gaming comprised the totality of the Nation's gaming activities. The importance of Class II gaming, both historically and currently, cannot be overemphasized. Without viable Class II gaming products, the interests and economic well-being of the Nation and all tribal governments are compromised. Accordingly, the Nation has and continues to make significant investments in Class II gaming technology, which makes up a significant percentage of the Nation's gaming activities today.

When the NIGC first proposed the promulgation of Class II technical standards, we were concerned foremost that any such rule, unless carefully crafted, could operate to undermine the viability and profitability of Class II gaming. We were particularly concerned that a poorly drafted or improperly applied regulation would deprive tribal governments of the full benefit of the law as set forth in the Indian Gaming Regulatory Act ("IGRA"). Neither were we clear on the question of agency authority to promulgate such standards. Our concerns deepened when early drafts of the now existing Part 547 contained unreasonable and objectionable provisions which indeed would have had a severe adverse financial impact on Class II gaming revenue if promulgated. Finally, by virtue of the fact that the agency did not provide evidence or

data indicating that the promulgation of such federal regulation was supported by objective facts and data, we were not convinced of the need for such regulations.

The technical standards were ultimately promulgated on November 10, 2008, and while many of our concerns in relation to the language were accommodated, many remained. The revisions now proposed by the NIGC, for the most part, accommodate most of our remaining objections. We have endeavored in the "specific comments" section of this submission, to provide suggested language which we believe accommodate our remaining concerns in a manner that we hope will prove acceptable to the NIGC. However, our concerns in relation to the "grandfather" provisions remain.

Before continuing we should note our awareness of the fact that on August 7, 2012, the NIGC published a bulletin clarifying the agency's intent in relation to the operation of the grandfather provision in the current rule. We agree with the NIGC that the sunset clause in the existing standards operates to provide a five-year period in which to bring Class II gaming systems manufactured or in play on November 10, 2008, into full compliance with the technical standards and would only operate to require the removal of those Class II gaming systems that could not meet the technical standards through modification by the deadline. However, the proposed revision to the grandfather provisions is drafted in a way that appears to require *all* Class II gaming systems manufactured before November 10, 2008, to be removed from operation by November 10, 2013 regardless of whether they have been certified or brought fully into compliance with 25 C.F.R. Part 547.

The issuance of the recent bulletin does much to reassure the Nation that it is not the NIGC's intent for the sunset provision to operate in such fashion. Unless otherwise amended, however, the sunset clause in the proposed rule when read together with the definition of "grandfathered Class II gaming systems" could operate to eliminate a significant number of Class II gaming systems that have never been linked to any security or integrity concerns. Based on the bulletin, we surmise that it is not the NIGC's intent to alter the existing grandfather provision in such a way as to require the removal of all grandfathered Class II gaming systems, but it is our position that the grandfather provision should be revised.

The text of the preamble accompanying the proposed revision to Part 547, indicates that the NIGC is considering whether substantive amendments to the grandfathering provisions are necessary and appropriate. In it, the NIGC invites tribal governments to provide specific facts and information regarding their Class II gaming systems in order to assess the potential impact of the grandfathering provisions on tribal gaming operations. The issue of cost is largely dependent on what the NIGC ultimately decides to do about the grandfather provision and we are not in a position to provide the NIGC a full scale economic impact statement under the various scenarios, i.e. no change to existing rule, promulgation of proposed revision, or complete deletion of the provision.

The data necessary to conduct an economic impact assessment nationally is simply not available to us nor have we budgeted resources that would be available for such purpose. Not only would it be difficult for us to collect this data from other tribal governments

due to its highly sensitive, proprietary nature, but, setting aside cost, even with the two-week extension of the deadline for comment, a 60-day period is insufficient to collect, compile, and analyze the data and then prepare a written assessment. While we have our own data, we think it would likely prove futile to extrapolate from it reliable estimates applicable to the Class II gaming industry as a whole. Finally, we are equally reluctant to disclose in a form accessible to the public our own proprietary information. We can state that:

1. If the NIGC revises the grandfather provision in the manner we suggest below, costs would be contained to a significant extent and our remaining concerns would be accommodated.

2. If the NIGC does not revise the existing Grandfather provision, but proceeds with the proposed revisions to the substantive provisions:

    a. The Nation will be required to invest considerable financial resources in re-certifying *all* of its Class II gaming systems because any new or changed standards would operate to invalidate the existing certifications;
    b. The Nation will bear the cost of modifying and/or replacing approximately 65% of its total Class II gaming player interfaces, which would be at a replacement cost of approximately $10,000-15,000 per unit; and
    c. The Nation stands to lose some or possibly all of its investment in a court-sanctioned Class II gaming system, which it purchased in reliance on a federal circuit court of appeals determination of its lawfulness.

3. If the NIGC promulgates the proposed revision to the grandfather provision as published:

    a. The sunset provision would operate to require the replacement of approximately 65% of its Class II gaming systems at a staggering cost; and
    b. The Nation would have to re-certify the remaining 35% of its Class II gaming systems because their certifications would be rendered invalid due to the imposition of new substantive standards.

While we certainly appreciate that the NIGC is confronted with deciding how to proceed with the revision of the Class II technical standards, particularly the grandfather provision, we are not in a position to provide the data requested in the preamble. Our conclusion in this regard should not be taken as recalcitrance on our part, but only a matter of practicality for the reasons discussed above. Based on our own data, we are certain that promulgation of the proposed revision as drafted would have an immense negative economic impact on the Class II gaming industry as a whole. Accordingly, should the NIGC elect to proceed with the revision as proposed, we would urge it to prepare in advance a cost-benefit analysis pursuant to Executive Order 12866, which requires such analysis of any regulatory action that will "adversely affect in a material

way the economy, a sector of the economy, productivity, competition . . . or State, local, or tribal governments or communities."[1]
As we indicated in our comments submitted in relation to the existing rule, we strongly believe that Part 547 should have been applied prospectively. At that time, we noted that:

We perceive that the NIGC does not fully appreciate that the proposed regulation constitutes product standards and that certain principles come into play when an administrative agency promulgates product standards. Many millions of dollars have been spent in the development of Class II gaming systems and many millions more have been invested in the development of gaming facilities based on the legal permissibility of such products in relation to Class II gaming. Many more millions were spent in litigation to vindicate the lawfulness of such products, and as the law was clarified, many millions have since been invested in these products. Tribes have invested hundreds of millions of dollars in the construction of gaming systems based solely on the lawfulness of these products and their availability in the market place. More million have been invested in purchases and other contractual arrangements.

Since the last of a long series of game classification cases were completed in 2003, a stable legal environment arose and from it settled expectations in the Class II marketplace. Class II gaming activities produce nearly $4 billion annually, virtually all of which is derived from electronically aided bingo games, most, if not all, of which have been reviewed . . . judicially. None of the games on the gaming floor today will meet the technical standards contained in the proposed regulation.

In spite of these facts, the NIGC does not provide a safe harbor for existing Class II gaming technology in the proposed rule. We can think of no administrative agency... that would impose new standards on products already in the marketplace or require a general recall of all products in the marketplace in the absence of a defect that poses an imminent threat to human life. Even when safety is an issue, federal agencies apply new product safety standards prospectively in order to give industry a reasonable "tooling-up" period.

On the issue of retroactive application of product standards, we pointed out:

The NIGC's omission of a reasonable grandfather provision similarly raises the issue of whether it is authorized to promulgate a rule with retroactive application. Retroactive application is disfavored even in relation to legislation.[2] Whether a statute has a retroactive effect is a fairly straightforward question: it is retroactive if it alters the legal consequences of acts completed before its effective date.[3] Specifically, a statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new

[1] Despite the status of the NIGC as an independent regulatory agency, Executive Orders 12866 and 13563 are applicable to the NIGC, which has adopted the Executive Orders, as evidenced by statements in Federal Register Notices confirming that the ongoing regulatory review is being conducted pursuant to Executive Orders 12866 and 13563.
[2] Martin v. Hadix, 527 U.S. 343, 352 (1999); Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)
[3] Miller v. Florida, 482 U.S. 423, 430 (1987).

disability, in respect to transactions or considerations already past."[4] In considering a law's retroactive effect, the court's analysis is to be guided by three "familiar considerations" that the Supreme Court has clearly enunciated: reasonable reliance, fair notice, and settled expectations.[5].

We believe that these considerations are equally relevant in relation to the instant rulemaking and warrant the NIGC's consideration, particularly in light of the fact that, even though the proposed substantive revision to the standards are neither extensive nor particularly objectionable, they would operate to negatively affect the certifications of all Class II gaming systems in operation today. Moreover, the proposed revision, in effect, creates two categories of grandfathered Class II gaming systems: 1) those in operation on November 10, 2008; and 2) those placed into operation after November 10, 2008, all of which were subject to the existing technical standards.

To forego revision of the existing grandfather provision would constitute a missed opportunity to promulgate a regulation that is fairer, less costly, more reasonable, and simpler to modify in the future. We therefore suggest the following revisions for the NIGC's consideration:

Withdraw the Sunset Clause and Revise the Definition of a Grandfathered Class II Gaming System.

The sunset clause should be removed in its entirety. It is a far more reasoned regulatory approach to allow the marketplace to "sunset" products rather than to impose new obligations and costs with each revision of the standards. Moreover, as indicated in the excerpts from our prior comments, this approach is more favored by law because it does not "take away or impair vested rights acquired under existing law, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past."[6] Finally, there is no need for specific statutory authority for promulgating a rule of prospective application.

In addition, the definition of "grandfathered Class II gaming systems" should be redefined to encompass all Class II gaming systems certified before the effective date of the new regulation, rather than just those systems manufactured before November 10, 2008. Regardless of whether the gaming system has been certified as a grandfathered system or as a currently compliant system, it should be treated as a "grandfathered Class II gaming system" for purposes of the final regulation. This creates a clear conceptual distinction between those gaming systems that have already been certified under the existing technical standards, and those gaming systems whose certifications will be based on the standards contained in the new regulation.

We therefore recommend that § 547.5(a)-(b) of the proposed rule be modified as described below:

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[4] Landgraf, 511 U.S. at 269.
[5] *Id.* at 270.
[6] *Covey v. Hollydale Mobile–home Estates*, 116 F. 3d. 830 (9th Cir. 1997).

(a) ~~*Limited immediate compliance.* A tribal gaming regulatory authority~~ TGRA shall:

(1) Require that all Class II gaming systems ~~software that affects the play of the Class II game be submitted, together with the signature verification required by § 547.8(f), to~~ be certified by a testing laboratory ~~recognized pursuant to paragraph (f)~~ as compliant with the standards contained in ~~of~~ this ~~section~~ Part ~~within 120 days after November 10, 2008~~ prior to operation of the Class II gaming system, except as provided in paragraph (b) of this section;

~~(2) Require that the testing laboratory test the submission to the standards established by § 547.8(b), § 547.8(f), § 547.14, and to any additional technical standards adopted by the TGRA;~~

~~(3) Require that the testing laboratory provide the TGRA with a formal written report setting forth and certifying to the findings and conclusions of the test;~~

~~(4) Make a finding, in the form of a certificate provided to the supplier or manufacturer of the Class II gaming system, that the Class II gaming system qualifies for grandfather status under the provisions of this section, but only upon receipt of a testing laboratory's report that the Class II gaming system is compliant with § 547.8(b), § 547.8(f), § 547.14, and any other technical standards adopted by the TGRA. If the TGRA does not issue the certificate, or if the testing laboratory finds that the Class II gaming system is not compliant with § 547.8(b), § 547.8(f), § 547.14, or any other technical standards adopted by the TGRA, then the gaming system shall immediately be removed from play and not be utilized.~~

~~(5) Retain a copy of any testing laboratory's report so long as the Class II gaming system that is the subject of the report remains available to the public for play;~~

~~(6) Retain a copy of any certificate of grandfather status so long as the Class II gaming system that is the subject of the certificate remains available to the public for play; and~~

~~(7) Require the supplier of any player interface to designate with a permanently affixed label each player interface with an identifying number and the date of manufacture or a statement that the date of manufacture was on or before November 10, 2008. The tribal gaming regulatory authority shall also require the supplier to provide a written declaration or affidavit affirming that the date of manufacture was on or before November 10, 2008.~~

(b) *Grandfather provisions.* All previously certified Class II gaming systems, including those manufactured before, on or after November 10, 2008, ~~and certified pursuant to paragraph (a)~~but prior to the effective date of this ~~section~~ Part ~~are~~ constitute grandfathered Class II gaming systems for which the following provisions apply:

~~(1) Grandfathered Class II gaming systems may continue in operation for a period of five years from November 10, 2008.~~

With regard to any concern the NIGC may have in relation to the extensive deletions we propose, we note that these provisions are now obsolete since these requirements must by now have been met. Retention of this language would only serve to complicate the application of the regulation to those Class II gaming systems that have been manufactured and placed into operation since November 10, 2008, all of which must be fully certified under the existing standard. The proposed deletions, thus, will not thwart the overall purpose of the regulation because each system is subject to certification under the standards in effect at the time it was placed into operation. Moreover, our proposed revision will make it much simpler to revise the standards in the future because there will be no need to craft language to address multiple categories of grandfathered systems with each revision. In other words, our proposed revision will spare the NIGC from having to make ever more complicated revisions to the grandfather provision with each subsequent revision of Part 547.

Clarify that 25 C.F.R. Part 547 Will Have Prospective Application.

The final regulation should specifically provide that the technical standards contained therein will be applied prospectively and clarify that certified Class II gaming systems are subject to the standards under which they were certified. This proposed addition would accord with fairness principles by removing any doubt as to the validity of the certification following any revision to the technical standards. We therefore recommend the following changes to proposed § 547.5(b)(4):

> (4) All modifications that affect the play of a grandfathered Class II gaming system must be approved pursuant to paragraph (c) of this section, except for the following:
>
> (i) Any software modifications that the TGRA finds will maintain or advance the grandfathered Class II gaming system's overall compliance with this part ~~or any applicable provisions of part 543 of this chapter~~, after receiving a new testing laboratory report that the modifications are compliant at a minimum with the applicable standards ~~established by § 547.8(b), § 547.14~~of Part 547 effective November 10, 2008, (as published in 73 Fed. Reg. 60527 on October 10, 2008), and any other standards adopted by the TGRA;
>
> (ii) Any hardware modifications that the TGRA finds will maintain or advance the grandfathered Class II gaming system's overall compliance with this part ~~or any applicable provisions of part 543 of this chapter~~, after receiving a new testing laboratory report that the modifications are compliant at a minimum with the applicable standards of Part 547 effective November 10, 2008 (as published in 73 Fed. Reg. 60527 on October 10, 2008), and any other standards adopted by the TGRA; and
>
> (iii) Any other modification to the software of a grandfathered Class II gaming system that the TGRA finds will not detract from, compromise or prejudice:

(A) The proper functioning, security, or integrity of the grandfathered Class II gaming system, and

(B) The grandfathered Class II gaming system's overall compliance with the requirements of this part or any ~~applicable provisions of part 543 of this chapter~~ other standards adopted by the TGRA.

(iv) ~~No such modification~~ Modifications may only be implemented with~~out~~ the approval of the TGRA. The TGRA shall maintain a record of the modification so long as the grandfathered Class II gaming system that is the subject of the modification remains available ~~to the public for play~~ for use in a Class II gaming operation and shall make the record available to the Commission upon request. The Commission will only make available for public review records or portions of records subject to release under the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; or the Indian Gaming Regulatory Act, 25 U.S.C. 2716(a).

(c) *Compliance*. Except as provided in paragraph (b) of this section, compliance with the applicable standards of this Part shall be applied prospectively.

(d) Any Class II gaming system subject to a judicial determination of its lawfulness shall be deemed to be in compliance with this Part.

We have also suggested adding a new sub-section (d), which would operate to protect the status of any Class II gaming system that has been previously validated by federal court decisions as well as tribal investments made in vindicating the lawfulness of such systems. We note that the number of Class II gaming systems that would come within this provision is extremely limited. As indicated earlier in our comments, the Nation made a substantial investment in acquiring a legacy Class II gaming system in reliance upon a judicial determination regarding its lawfulness. The proposed language would operate to ensure that, in such extremely limited circumstances, tribal investments are protected.

I. SPECIFIC COMMENTS

A. § 547.5(c)(4) Testing of Player Interfaces.

This section requires testing laboratories to "confirm[] that the operation of *each* player interface has been certified . . . ." (emphasis added). In practice, however, testing laboratories generally do not test *each* player interface that will be going onto the gaming floor, but rather *models* of those interfaces to ensure that they meet all testing requirements. Requiring each and every player interface to undergo such testing is unduly burdensome and inconsistent with established industry practices. We request that this provision be amended to clarify that "each *submitted model* of a player interface" will be required to undergo laboratory testing.

B. § 547.14(f)(4) Reporting of Bias.

We are concerned by the requirement to report "any bias" to the TGRA, especially in light of the NIGC's Bulletin 2008-4, which states that "A scaling algorithm is considered to be unbiased if the measured bias is no greater than 1 in 50 million.'" We agree with the bias standard contained in the NIGC's Bulletin and believe that tribal governments should be required to report only those biases that are greater than 1 in 50 million. We therefore request that proposed §547.14(f)(4) be amended to reflect the bias stated in NIGC Bulletin 2008-4.

C. § 547.16(b) Continuous Display of Disclaimers.

This provision requires player interfaces to "continually display" certain disclaimers. While we agree that such disclaimers are appropriate, we are concerned that requiring such disclaimers to be "continually displayed" is unnecessarily burdensome and will result in limited benefits relative to the potential costs. Rather than requiring the continuous display of such disclaimers, we believe a more reasonable approach would be one in which the disclaimers must either be: (1) continually displayed; or (2) displayed until acknowledged by the player. We note that the latter option achieves the same desired outcome – i.e., ensuring that the patron fully understands the nature of the game being played, but provides greater for greater flexibility in utilizing emerging technologies such as handheld devices.

II. CONCLUSION

We urge the NIGC to fully consider the proposals set forth in these comments. We have endeavored to offer constructive proposals in a way that satisfies both the tribal and federal interest without compromising the safety and integrity of Class II gaming systems, and to explain our reasoning as succinctly as possible. Class II gaming is of utmost importance to Indian Country, generally, and to the Nation, in particular. It remains a vital component of the Nation's gaming activities. We look to the NIGC to ensure that its regulations are not only fair and reasonable, but foremost, provide tribal governments the full benefit of the law as set forth in IGRA.

The Chickasaw Nation appreciates the opportunity to comment on these important issues. It is our hope that these comments prove helpful as the NIGC conducts its regulatory analysis of the grandfathering provisions and addresses the remaining issues in the proposed rule.