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

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 written comments on the discussion drafts of the Minimum Internal Control Standards (MICS) and Technical Standards for Class II gaming. The NIGC is to be commended for issuing discussion drafts and soliciting tribal input on these important regulations prior to the rulemaking process. Such actions reflect the commitment of the NIGC to engage in meaningful consultation with tribal governments as it considers amendments that will bring the regulations closest to the purposes and goals of the Indian Gaming Regulatory Act (IGRA). The opportunity to participate in this important consultation process is greatly appreciated.

We have long recognized the importance of minimum internal control standards and technical standards in protecting the assets and the integrity of the Chickasaw Nation's Class II gaming activities. It is our hope that the upcoming rulemaking processes on the Class II MICS and Technical Standards will result in a more effective Class II regulatory framework that advances the goals IGRA, including the promotion of 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

This opportunity to comment on the NIGC's preliminary discussion draft of 25 C.F.R. Part 543 – Minimum Internal Control Standards (MICS) for Class II Gaming is appreciated. The Chickasaw Nation is extremely pleased that the NIGC has published for comment a discussion draft of this important regulation before undertaking any official rulemaking activity. Among other benefits, early tribal involvement provides the NIGC with an opportunity to consider alternative proposals that may better accommodate the interests and concerns of tribal governments *prior* to issuing a proposed rule. In addition, early tribal involvement is critical to ensuring that consultation is both meaningful and consistent with the special government-to-government relationship between the NIGC and tribal governments.

Before providing comments on the discussion draft of the Class II MICS, the Chickasaw Nation would like to express support for the hard work and dedication of the MICS Tribal Advisory Committee (MTAC) and the Tribal Gaming Working Group (TGWG), both of which bring to the table first-hand knowledge, experience, and a perspective otherwise unavailable to the NIGC. The level of collaboration and mutual respect between TGWG members in spite of their various industry and regulatory interests has been extraordinary and is unprecedented in the tribal gaming context. The Chickasaw Nation is pleased to be a part of this collaborative rulemaking process and to have our views represented on both the MTAC and TGWG.

The Chickasaw Nation is a strong proponent of using a more collaborative rulemaking process for complex regulatory initiatives such as the Class II MICS. Because such initiatives deal with a wide range of issues that affect a variety of different stakeholders, the rulemaking process for such regulations requires multidisciplinary collaboration that draws on the subject matter expertise of affected parties. The NIGC's multidisciplinary approach to the Class II MICS as reflected by its use of the MTAC and the TGWG is encouraging and will help ensure that the final rule reflects a consensus that is at least minimally acceptable to tribal governments.

We encourage the NIGC to continue these important outreach efforts and to give careful consideration to the comments and recommendations of the MTAC and TGWG. While we believe that the discussion draft has obviously benefited from the input provided by the MTAC and the TGWG, we believe that the regulation would benefit from additional revisions, which we have identified below for your consideration. We respectfully request that our comments below be considered in the positive spirit in which they are intended.

I. General Comments

A. Alternatives to Prescriptive Regulations

A key part of developing an effective regulatory framework is selecting the proper regulatory approach that best suits the particular environment of the industry being regulated. When determining which regulatory approach is most appropriate to the situation, it is essential that the agency consider, among other things, the operational realities of the industry being regulated; whether the regulations are capable of practicable implementation; and the extent to which the regulations are consistent with other applicable laws, rules, and policies.

The prescriptive regulatory approach being taken in the discussion draft of the Class II MICS is, in the Chickasaw Nation's view, ill-suited to the Class II gaming industry. We note that the Class II MICS have historically caused concerns dating back to when the initial drafts were first developed by the NIGC. We recall that the original version of the Class II MICS was based in large part on the regulations contained in 25 C.F.R. Part 542, which are specific to Class III gaming, as well as the Nevada Gaming Control Board's MICS, which govern commercial, not tribal, gaming activities.

Much like the Class III and Nevada MICS on which it is based, the discussion draft contains highly detailed and inflexible procedural requirements and imposes a one-size-fits-all approach to regulation that disregards the diversity of needs and resources within the tribal gaming industry. Instead of establishing baseline or minimum standards for Class II gaming, the discussion draft prescribes the specific manner in which a standard or regulatory objective is to be achieved. The draft mandates the particular department or job position responsible for performing the specified task, as well as the precise procedural steps that the employee(s) must take in order to achieve compliance. The inflexibility created by freezing certain specifics such as job functions and descriptions; organizational structures; and game components can result in operational paralysis and sap the creative spirit of employees. It can also result in the unintended effect of reducing the morale of tribal regulators as they recognize that they are responsible for enforcing standards that are losing meaning and relevance.

The lack of flexibility in the regulatory requirements contained in the discussion draft is especially problematic in the tribal gaming context where technology is constantly evolving, changing both the games to be regulated and the tools available to operators and regulators. Because prescriptive regulations tend to be a distillation of past experiences, it is inevitable that such regulations will become less and less relevant over time as technology progresses. Thus, regulatory practices that made good sense when first adopted can quickly become outdated. A regulation that has become outdated or incompatible with the industry's best practices can have sharply negative effects on a tribal gaming operation. In addition to increasing compliance costs, outdated regulations make it substantially more difficulty to integrate new technology and management

improvements, both of which are critical to the success and viability of a tribal government operation.

Under the discussion draft's prescriptive regulatory approach, tribal governments have little to no flexibility in considering more efficient, cost-effective, and technologically appropriate alternatives for achieving compliance, even if such alternative will result in the same desired outcome. Such an approach threatens to compromise the regulatory framework established under the IGRA, which vests tribal government with primary regulatory authority over their gaming activities, subject only to the NIGC's oversight responsibilities. Moreover, the legislative history clearly shows that Congress was alert to the fact that technology would continue to advance in the play of Class II games and "intend[ed] that tribes be given the opportunity to take advantage of modern methods of conducting class II games" as "the language regarding technology is designed to provide maximum flexibility."[1]

It appears that an alternative regulatory approach is necessary – one that accounts for the specific situations that apply at individual gaming operations, such as the operation's size, scope, structure, and available resources. We note that at least one jurisdiction has recognized the impracticable nature of enforcing prescriptive internal control regulations and adopted an alternative regulatory approach to its gaming regulations. The State of New Jersey recently transformed its approach to internal control standards by removing certain regulatory processes that discouraged licensees from exercising any flexibility or discretion in their operational procedures. Under the new laws, New Jersey licensees develop their own internal controls and file them with their regulators, but those standards are not subject to regulatory approval.[2] The New Jersey legislature notes in its preamble that the purpose of the amendments was "to allow licensees to take full and timely advantage of advancements in technology, particularly in information technology, and business management."[3]

We hope the NIGC will take advantage of this regulatory review process to similarly consider and implement a more flexible approach to regulation that respects the role of tribal governments as primary regulators. In the Chickasaw Nation's view, the optimal regulatory approach to the Class II MICS would be one that focuses on providing baseline or "minimum" standards for Class II gaming so that tribal governments can develop procedures that are specifically tailored to the nature and size of their gaming operation. Rather than describing the step-by-step processes to which tribal governments must comply, the content of the Class II MICS should instead focus on the desired regulatory outcomes. By removing procedure-related language from the regulation, tribal governments will have the necessary flexibility to develop their own operational procedures and organizational structures based on their available resources and any changes in circumstances or technology.

[1] S. Rep. No. 100-446, at 9 (1998).

[2] S12, § 65, amending § 99 of the New Jersey Casino Control Act, N.J.S.A. 5:12-99.

[3] S12, § 1(b)(19), amending N.J.S.A. 5:12-1.

We agree with the TGWG's position that the use of guidance documents would be helpful in implementing this alternative regulatory approach. We believe that the issuance of guidance documents would be a more appropriate means of setting forth the specific procedural steps that tribal governments should take to meet the Class II standards. The use of guidance documents would give the NIGC the flexibility to amend its procedures without having to undergo the full rulemaking process, which is particularly useful in the tribal gaming context where technologies and best practices are constantly evolving. Also, guidance documents would be especially helpful for those smaller tribal gaming operations with little internal capacity to develop their own regulatory processes.

Importantly, the flexibility created through the use of guidance documents would help bring the regulation closer to the goals and purposes of IGRA. As noted above, one of the key considerations when developing an effective regulatory framework is the extent to which the regulation is consistent with other applicable laws and policies. We believe the alternative regulatory approach identified above is more consistent with the plain language of IGRA, which designates tribal governments as the exclusive, primary regulators of their gaming activities.

Furthermore, such approach would promote the Consultation General Principles outlined in the NIGC's own draft Consultation Policy, which was issued on March 8, 2011. In the draft Consultation Policy, the NIGC states that it "will encourage Tribes to develop their own policies to achieve program objectives, and, when possible, defer to Tribes to establish their own standards." The NIGC also states that "[i]n determining whether to establish Federal standards, the NIGC will consult with Tribal officials as to the need for the Federal standards under consideration and the availability of any alternatives that would limit the scope of any standards or otherwise preserve the prerogatives, authority, and autonomy of tribes." We hope that through consultation with tribal officials, the NIGC will move away from its current prescriptive approach and towards a more outcomes-based approach that respects the inherent, sovereign powers of tribal governments to make and enforce their own laws and govern their own territory.

B. Rules of Construction

Although at first blush they may appear to be somewhat "boilerplate" provisions, the rules of construction are important guideposts that help provide clarity and precision in the interpretation of unclear or ambiguous regulatory provisions. We are alarmed by the absence of certain important rules in the discussion draft. For instance, a "No Limitation of Technology" provision can be found in the discussion draft of Class II Technical Standards, but not in the discussion draft of the Class II MICS. We can think of no reason why this provision should be in the Technical Standards but not in the Class II MICS. This provision should be added in to ensure that the Class II MICS are not interpreted to limit the use of technology or preclude the use of technology that is not specifically referenced.

In addition, we note the lack of a severability provision clarifying that any invalid provision of the regulation is severable and will not affect the validity of the regulation as a whole. The inclusion of a severability provision would help protect against the possibility of having the entire regulation overturned in the event that one of its provisions is held to be invalid.

Finally, we ask that the NIGC include an "Only Applicable Standards Apply" provision, which like the technology provision referenced above, is included in the discussion draft of the Technical Standards. Without such a provision, the Class II MICS may be misinterpreted to apply to all Class II game components and systems, not just those to which the regulations are applicable. We do not believe that such an outcome is what the NIGC intended.

II. Specific Comments

A. 25 C.F.R. § 543.2: Definitions

Agent: The discussion draft defines an "agent" as "a person authorized by the gaming operation . . . to make decisions or perform assigned tasks or actions on behalf of the gaming operation" (emphasis added). We can think of many instances where an agent's functions can be more efficiently performed by a computer application. We are concerned that this narrow definition of an agent will be unnecessarily burdensome on the gaming operation, especially those with relatively limited resources. We ask the NIGC to amend this definition to support the use of a computer application in performing the functions of an agent.

Gaming Promotion: The term "Class II" should be added to the discussion draft's definition of a "gaming promotion" to clarify that the scope of the term is limited to Class II gaming and not all game play.

B. 25 C.F.R. § 543.3: Primary Regulatory Authority of Tribal Governments

The IGRA establishes a comprehensive regulatory framework for tribal gaming under which tribal, state, and federal agencies are assigned regulatory roles based on the classification of the game being played. Under IGRA, Class II gaming comes within the primary regulatory authority of tribal governments subject to certain provisions within IGRA. One of those provisions can be found in § 2706 of IGRA, which provides the NIGC with authority to "monitor Class II gaming."

Despite the plain language in IGRA, the discussion draft states in § 543.3(a) that "TGRAs *also* regulate Class II gaming" (emphasis added). However, later in that same section, the NIGC includes a contradictory yet more accurate statement of the TGRA's authority by stating that "TGRAs are the *primary* regulator of their gaming operation(s)" (emphasis added). In addition to being inconsistent with other provisions in the discussion draft, the statement that TGRAs *also* regulate Class II gaming suggests that it shares this responsibility with another entity, which conflicts with IGRA's express

statement that tribal governments have "the exclusive right to regulate gaming activity on Indian lands." We ask the NIGC correct these references to the TGRA's authority to mirror the language in §543.3(h)(2).

C. 25 C.F.R. § 543.5: Alternate Control Standards

This section sets out the procedures for applying and receiving approval for an alternate control standard without providing any guidance on the types of changes that will constitute an alternate control standard. We believe that only those changes that alter the intent and coverage of the standard contained in the Class II MICS should be subject to this section. In contrast, minor procedural changes that do not affect the purpose of the standard should not be subject to the requirements in this section.

D. 25 C.F.R. § 543.7 & § 543.8: "Gaming System" and "Manual" Bingo

It is well-established in the Class II gaming industry that "bingo is bingo," regardless of whether technology is used to assist in the conduct of the game. The discussion draft, however, draws an unnecessary distinction between "gaming system" bingo and "manual" bingo, thereby subjecting bingo game activities to two different sets of regulations depending on the type of technology being used. This is a new and alarming change to the treatment of bingo at the regulatory level. We are unaware of any events or incidents that may have prompted this new classification scheme and does not believe that the proposed distinction is necessary in improving the overall regulatory framework for Class II gaming. There does not appear to be any threats to the integrity or security of bingo games that would warrant this new classification scheme.

The discussion draft's separate treatment of "manual" bingo from "gaming system" bingo only causes confusion and increases the risk of duplicative or erroneous regulations. We have already identified several areas of concern in the discussion draft, including misplaced provisions that do not accurately reflect the type of bingo being conducted. For instance, § 543.7(c)(3) requires that all objects eligible for the draw to be available to be drawn prior to the next draw for Class II "gaming system" bingo, even though this requirement is applicable to "manual" bingo only. Also, in §543.8(e)(3)(iv)(B), the discussion draft requires payout records to include a description of the event, including any *player interface malfunction*, despite the fact that the requirements set forth in § 543.8 apply only to *manual* bingo, which does not involve player interfaces. There are also instances of duplicative language, such as in § 543.8(e)(5)(ii), which provides that "controls must include the number of agents required for authorization or signature for each predetermined level of payout," despite the fact that an earlier provision in the same section requires at least two agents to perform the validation and verification of a payout.

In addition, the discussion draft contains several requirements for bingo games that are impracticable or unnecessarily burdensome for tribal governments. The validation and verification procedures for "gaming system" bingo are especially problematic because they require two agents to be present to determine the validity of the

claim prior to the payment of the prize and to verify that the winning pattern has been achieved on the winning card. Since the definition of "agent" in the discussion draft no longer includes systems, this means that two individuals must be physically present to verify a win. This is an impracticable and unreasonable requirement for "gaming system" bingo that will unnecessarily burden the gaming operation. We note that this requirement may be more appropriate for "manual" bingo which involves hand-pays.

For the foregoing reasons, we urge the NIGC to abandon its proposal to draw a regulatory distinction between "manual" and "gaming system" bingo, and ask that the NIGC streamline the regulations into one section covering all bingo games.

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

We believe that the regulation of gaming promotions falls within the purview of tribal governments and that TGRAs are the more appropriate authority for establishing and enforcing proper standards to govern promotional activities. As an alternative to including promotion regulations in the Class II MICS, we recommend the NIGC issue guidance documents containing recommended procedures for ensuring the integrity and honesty of gaming promotions.

III. Organizational Concerns

A. Redundant and Duplicative Provisions

To simplify the format and make the regulations more user-friendly, we recommend consolidating certain sections containing related controls, even if they apply to different departments or game types. As drafted, certain controls such as those relating to cash and cash equivalents and drop and count are scattered throughout the regulation according to the game being conducted. This just needlessly expands the size of the Class II MICS and increases the potential for conflicts between the language included and future revisions of the standards. If left unchanged, this will also make the Class II MICS more difficult to use and potentially confuse the user who will have to comb through different sections to ensure that all requirements relating to the control have been sufficiently accounted for.

Below are some examples of specific provisions that we believe should be grouped together according to their general subject matter:

- 25 C.F.R. § 543.17: Drop and Count: The discussion draft separates the drop and count requirements by department or game type. We recommend a more consolidated approach with fewer sections that include drop, count, controlled key, count team and count room requirements for *all* gaming activity.
- 25 C.F.R. § 543.18: Cage, Vault, Kiosk, Cash, and Cash Equivalents: This section contains standards for patron deposited funds, even though a separate section for patron deposited funds can be found in § 543.14. Similarly, this section contains

procedures for promotional payments, drawings, and giveaway programs, despite the fact that a separate section for promotions can be found in § 543.12.

B. Confusing or Outdated Terminology

In reviewing the discussion draft, the NIGC came across several terms and references that were either confusing or outdated or linked with terminology used in the various drafts prepared by tribal advisory committees and working groups. In many instances, certain undefined terms are used even though a different term with the same meaning is defined in § 543.2. The following is a list of terms that should be revised to provide greater clarity or consistency with current practices:

- § 543.17(f): The term "soft count," which is undefined in the discussion draft, is used in this section even though all other count sections use the term "count."
- § 543.17(g): The term "personnel" is used instead of the defined term "agent," and the term "financial instrument storage component" is used instead of the defined term "drop box."
- § 543.20(e)(2)-(3): The term "systems," as it is used in this section as well as in other areas of the regulation, should be clarified, especially if it is referring to the defined term "Class II gaming system."
- § 543.23(c)(8): The term "Commission" should be replaced with "TGRA."

IV. Conclusion

In closing, the Chickasaw Nation wishes to emphasize that a sound, stable regulatory environment is essential to the continued success and long-term prosperity of our gaming operations. Our comments above are intended to advance this objective in a manner consistent with our right to self-government and consistent with principles of federal Indian law and policy. We respectfully seek your favorable consideration of our comments and ask that you carefully consider our views as you move through the rulemaking process.

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 welcomes the release of this discussion draft of 25 C.F.R. Part 547 – Minimum Technical Standards for Gaming Equipment Used With the Play of Class II Games (Class II Technical Standards) and the opportunity to provide comments on the proposed revisions contained in the draft. The National Indian Gaming Commission (NIGC) has earned high marks for its continuous efforts to reach out to tribal governments and solicit tribal input during this important regulatory review process. We applaud the NIGC for engaging with tribal governments during the early planning stages of the rulemaking process. Early tribal involvement is a key step towards developing a final rule that will be at least minimally acceptable to tribal governments. We continue to be encouraged by the NIGC's commitment to accommodate tribal concerns and propose revisions that will bring the regulations closest to the purposes and goals of the Indian Gaming Regulatory Act (IGRA).

We note that it has been closely monitoring the work of the Tribal Gaming Working Group (TGWG) and the Tribal Advisory Committee (TAC), both of which have worked tirelessly in bringing to the table a level of technical expertise that would otherwise be unavailable. We would like to take this opportunity to express our support for the TGWG's and TAC's efforts to produce good technical and control standards. We view the collaboration between the TAC, the TGWG, and the NIGC as an extraordinary process that should form the model for future rulemaking processes. This collaborative process, if taken seriously, will ensure that the final rule of this important regulation preserves and protects the security and integrity of Class II gaming and accommodates tribal concerns to the fullest extent permitted by law.

In reviewing the discussion draft, we were pleased to see that the NIGC accepted several of the comments raised by tribal governments during the last rulemaking on the Class II Technical Standards. We are especially pleased by the NIGC's proposal to remove the restriction on tribal utilization of its own testing laboratory. The underlying issue in this regard has never been tribal ownership of testing laboratories, but rather the independence and appropriate segregation of functions from the entity for whom testing is being conducted. Thus, we strongly support the proposed language in § 547.5(f)(iii) of the discussion draft, which recognizes the sovereign authority of tribal governments to own or operate testing laboratories so long as it does not pose a conflict of interest with its operations.

We are also pleased that the discussion draft no longer requires submission of player interfaces to Underwriters' Laboratories for testing prior to being approved by the TGRA. Nothing in the IGRA supports the proposition that the NIGC is authorized to establish or enforce electrical product safety standards. Moreover, even if the NIGC had such authority, we view the identification of the specific laboratory that must conduct the

testing as an improper exercise of that authority. While it may be prudent to require the manufacturer to provide some certification or assurance as to the safety of the product, we believe tribal governments should be responsible for establishing and enforcing such requirements pursuant to their roles as primary regulators.

We are especially pleased by the NIGC's proposal to remove the arbitrary minimum probability requirement for progressive prizes. While it is appropriate to require the manufacturer to disclose to the TGRA the mathematical expectations of the game, the probability requirement of 1 in 100,000,000 for progressive prizes and 1 in 50,000,000 for all other prizes was arbitrary and inconsistent with the probability standards applicable to most, if not all, charitable bingo operations and state lotteries. The Chickasaw Nation thus fully supports the proposed removal of this arbitrary probability requirement, which will allow for greater flexibility and discretion.

Finally, we appreciate that the NIGC has deleted references to "entertaining displays" in relation to Class II player interface display requirements. In bingo, the game outcome is displayed on the bingo card located on the player interface, which is independent of, and separate from, the "entertaining display." The entertaining display therefore is irrelevant for regulatory purposes as it has absolutely no legal significance whatsoever to the outcome of the game.

While we recognize and appreciate the proposed changes identified above, there are several remaining issues of significance that we would like to bring to the NIGC's attention, the most important of which concern the revised grandfather provisions in the discussion draft.

Grandfather Provisions

The Chickasaw Nation is concerned that the NIGC may not fully appreciate the extent of the harm that is being threatened by the grandfather provisions in the discussion draft. In short, the discussion draft threatens the continued success and viability of the Class II gaming industry by requiring the forced removal of certain game products and systems from the marketplace. The economic impact of such removal will be disastrous for the tribal gaming industry and will have a devastating effect on a vitally important portion of tribal gaming. Significant human and economic capital has been invested by tribal governments in constructing gaming systems based on the lawfulness of certain products and their availability in the marketplace. In addition to creating a substantial hardship on tribal gaming operations, it will invalidate any components previously validated by federal court decisions. Many millions of dollars have been spent by tribal governments in litigation to vindicate the lawfulness of certain systems. If promulgated as proposed in the discussion draft, the regulations will directly defeat IGRA's goal "to promote tribal economic development, tribal self-sufficiency, and strong tribal government."

A. 5-Year Sunset Clause

Tribal leaders, regulators, attorneys, manufacturers, and other tribal gaming industry representatives agree virtually unanimously that the grandfather provisions are impracticable and will cause severe economic harm to tribal governments. We are disappointed that, in spite of this overwhelming opposition, the discussion draft does not adequately address the principal objections that have been raised by the tribal gaming community. The discussion draft still requires the removal of all grandfathered Class II gaming systems at the end of the five-year sunset period. The requirement that all previously manufactured products be removed from the marketplace is notably inconsistent with fundamental principles of administrative law. We can think of no administrative agency, including those with specific statutory authority to promulgate product standards that would require a general recall of products in the marketplace without a showing of a defect or flaw that poses an imminent threat to human life.

In general, retroactive rules such as the five-year sunset clause are disfavored in the law. In the context of administrative rulemaking, a rule is retroactive if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[4] Since the five-year sunset clause mandates a forced recall of Class II gaming products that were valid and permissible before the Technical Standards were enacted, the rule has a retroactive effect on those systems that have been properly grandfathered in pursuant to the grandfathering provisions in the existing regulations.

In order for a retroactive rule to be upheld, there must be an unmistakable congressional intention that that the law apply retroactively. The Supreme Court instructs that a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.[5] The IGRA cannot properly be read to authorize the NIGC to promulgate retroactive regulations with respect to product safety standards. Assuming, arguendo, however, that the NIGC had statutory authority to issue product standards with retroactive application, the rule must nonetheless survive the arbitrary and capricious standard. Given that most, if not all, grandfathered Class II gaming systems have been operating without any safety or integrity issues for many years, it seems arbitrary and capricious for the NIGC to recall such products from the market. Such recall does not appear to be based on reasoned explanations. In general, a recall of products in operation before the regulation is usually triggered by a defect or flaw that poses an imminent threat to human life. The Chickasaw Nation is unaware of any defects or flaws or threats to human life in relation to grandfathered Class II gaming systems that would warrant a product recall.

For the reasons identified above, we ask the NIGC to consider removing the five-year sunset clause and adding language that will authorize the continued use of any Class II gaming component that was previously certified under current or any pre-existing Technical Standards or approved by judicial ruling.

---

[4] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994).
[5] *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

B. Competitive Imbalances

Under the discussion draft, only those gaming systems that were "available for use" at any tribal gaming facility can qualify as a grandfathered system. This could potentially cause an unfair competitive advantage by allowing certain tribal operators to use a grandfathered system while excluding others who did not have that same system "available for use" on or before the effective date. This may become of importance for those tribal governments that did not have a Class II gaming operation before the effective date. As a matter of fairness, those tribal governments should be allowed to use systems that have been properly grandfathered in, regardless of whether such system was in use by the tribal operator before the effective date.

C. Potential Invalidation of Existing Certifications

Rather than remedying the principal flaws of the grandfather provisions in the existing regulation, the discussion draft threatens to cause even greater harm to the Class II gaming industry by potentially invalidating existing certifications. The discussion draft now requires that all previously certified systems to have been tested against standards that were unavailable at the time of testing. Specifically, the draft imposes new rules on previously certified products, thereby making it virtually impossible for any existing certification to remain valid in light of the new rules. The Chickasaw Nation urges the NIGC to amend its regulations to ensure maximum protection of those certifications that were properly obtained based on the information available at the time of testing.

Definitions

A. Proprietary Class II System Component

The Chickasaw Nation requests clarification as to the intent and meaning behind the term "Proprietary Class II System Component," which is not used anywhere else in the discussion draft. The definition only creates confusion as to its applicability and adds no value to the technical standards. We therefore ask that it be removed or clarified to provide guidance on how the term will be applied.

B. Reflexive Software

One of our primary concerns with the definition of "reflexive software" is that the term may be interpreted to inadvertently cover existing games that include awards such as "good neighbor" prizes to players, which have always been part of the game commonly known as bingo. To remedy this, we recommend identifying the harm the provision is intended to prevent – i.e., depriving a player of a prize to which he or she is otherwise entitled. Not only is this more consistent with the industry's understanding of reflexive software, but it will also help ensure that the term is properly applied in a manner consistent with industry practices.

Primary Regulatory Authority of Tribal Governments

Section 547.3(a) provides that tribal governments "*also* regulate Class II gaming," which conflicts with IGRA's express language vesting tribal governments with *exclusive* regulatory authority over their gaming operations, subject only to the NIGC's oversight responsibilities as specified in IGRA. We note that the weight of the regulatory responsibility falls most heavily on TGRAs that are responsible for carrying out the day-to-day activities essential to the effective regulation of gaming. In our view, this is precisely as it should be given that the highest governmental interest in the regulation of gaming belongs to tribal governments. We ask the NIGC to revise this section to clearly and unequivocally state that tribal governments are the *primary* regulators of their gaming operation consistent with IGRA and the functions of the TGRA.

Conclusion

In closing, we again urge the NIGC to reconsider its approach to the grandfather provisions and implement changes that will preserve the honesty and integrity of tribal gaming without destroying its economic stability and future viability. We also ask that you give careful consideration of our comments in your deliberations as you consider revisions that will improve the overall regulatory environment within which Class II gaming is conducted.