

Delaware Nation

P.O. Box 825
Anadarko, OK 73005
405 / 247-2448
Fax: 405 / 247-9393

April 27, 2012

VIA E-mail to reg.review@nigc.gov

Tracie L. Stevens, Chairwoman
Steffani A. Cochran, Vice-Chairperson
Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

Re: *Comments on Discussion Draft Part 543: Minimum Internal Control Standards for Class II Gaming, and Discussion Draft Part 547: Technical Standards for Class II Gaming*

Dear Chairwoman Stevens, Vice-Chairperson Cochran and Commissioner Little:

Please accept the following as the Delaware Nation's ("Nation") comments on the National Indian Gaming Commission's ("NIGC") Discussion Drafts of Part 543 Minimum Internal Control Standards ("MICS") for Class II Gaming, and of Part 547 Technical Standards for Class II Gaming.

The Nation wishes to thank the NIGC for delaying the effective date of the final rules for Class II MICS so that the consultation process could go forward with all interested tribal nations in order to protect our Class II gaming. As with most small tribes like the Delaware Nation, Class II gaming represents an integral part of our assets that support tribal citizens in the areas of education, social services, tribal government, and other economic development. Without Class II gaming, the Delaware Nation would not be the success it is, and the Nation appreciates the NIGC's collaboration in this rule-making process. With that spirit of cooperation in mind, the Nation offers the following areas of comment on the above-referenced Discussion Draft, and hopes that these comments will be considered with additional consultation in the future prior to such Discussion Draft MICS being published as a proposed rule.

General Comments

First, the Nation finds many areas of inconsistency and disorganization in the Discussion Draft that will cause confusion in the interpretation from a regulatory and operation point of view. The Discussion Draft is missing rules of interpretation and construction that are needed to ascertain the proper meaning of specific provisions. The Nation requests additional time for review and clarification for all inconsistencies and other issues that will come to light with all tribal nations' comments being published.

Further, both the Nation supports the work being performed by the Tribal Gaming Working Group (TGWG) and requests that this letter be considered a supplement to the proposals and comments that have already been submitted to the NIGC for review and consultation.

Finally, it is clear that the IGRA vests Indian tribes with “the exclusive right to regulate gaming activity on Indian lands.” The NIGC is only given the authority to “monitor” gaming in Section 2706 of IGRA – thus holding true to the intent of IGRA. Ergo, the proposed MICS should reflect this overlying premise and intent of IGRA. Additional specific areas are addressed below.

Specific Comments

25 C.F.R. §543.2: Definition of Agent. The Discussion Draft’s definition of “agent” as a “person” does not support the use of a computer application or software to perform functions of an agent. This is a narrow and impracticable definition that limits the tribe’s use of technology to perform the functions of an agent, especially in instances when more than one agent is required to be present and staffing and budgetary concerns prevent the same from being an effective use of employee time.

25 C.F.R. §543.3 System of Internal Controls (SICS). The Nation does not support and objects to the NIGC's proposal to regulate the Tribe's internal system of operations it uses to comply with its TICS and the federal MICS. First, the proposed SICS go beyond the scope of the NIGC’s regulatory authority. The IGRA does not allow the NIGC to tell a tribe how to staff its gaming operations, which personnel should complete which tasks under the TICS and MICS, or how they should interact to comply with MICS. Tribes are vested with the authority to create and follow that system. Thus, the SICS would infringe upon the role of tribal governments as primary regulators by adding an additional level of unnecessary federal control. Tribes already have a system of operational controls used to comply with TICS and MICS, and the NIGC already has the authority to make sure Tribes follow MICS. To add Adding SICS to the MICS is unnecessary bureaucracy.

Additionally, the SICS are unclear – there is no definition as to what constitutes a "proper" SICS. Despite this vagueness, section 543.3(h) in the Discussion Draft allows the NIGC to impose penalties on the Tribe for SICS "deficiencies" even though there is no objective standard for such SICS.

25 C.F.R. §543.7 & §543.8: Bingo Games. Bingo, quite simply, is bingo. However, the Discussion Draft attempts to redefine bingo from the current MICS with two different sets of controls for what is an indistinguishable game. One set of controls is for "Class II Gaming System Bingo", and the other for "Manual Bingo." Neither term is defined, making the two different sets of controls impossible to implement. For example, the use of technologic aids is allowed under IGRA in the play of bingo. This is acknowledged in the set of controls for "Manual Bingo" and under the “Class II Gaming System Bingo.” This opens a gaming operation up to confusing applications of two different sets of MICS on the same issue – use of technologic aids for bingo. Again, bingo is bingo. One set of operational controls for MICS should suffice to eliminate any gaming operation confusion on what is now a distinction without a difference.

25 C.F.R. §543.12 Gaming Promotions. The Nation objects to this part of the Discussion Draft in that the NIGC has no regulatory authority over gaming promotional activities. The current MICS do not speak to this issue, and it serves no purpose for the NIGC to regulate a promotional activity that is not gaming and does not involve consideration. The Nation has appropriate controls in place to approve its gaming operational promotional activity and respectfully requests to be able to govern that issue without NIGC regulation.

25 C.F.R. § 547.5 Grandfather Provisions. The Nation strenuously objects to the substantive requirements of the grandfather provisions contained in the Discussion Draft. Again, the Nation relies heavily upon its Class II gaming for its very survival, and such grandfather provisions would cause a severe economic hardship for the Nation considering those targeted games' popularity in our market. The Tribal Advisory Committee, the TGWG, manufacturers and numerous other tribal governments have also objected to these alarming requirements.

The Discussion Draft still requires all grandfathered Class II gaming systems to be retired and removed from operation by November 13, 2013. Further, the grandfather provisions apply only to those gaming systems that were manufactured or placed in a tribal facility on or before November 10, 2008. This seems unfair and inappropriate for the NIGC to promulgate a rule that has retroactive application to productions already in the marketplace – which operate by all accounts safely and with integrity – without a compelling need such as a life-threatening defect in the product. There is no administrative federal agency that would compel a “general recall” of a product without a showing of a defect or flaw that poses imminent harm to human life.

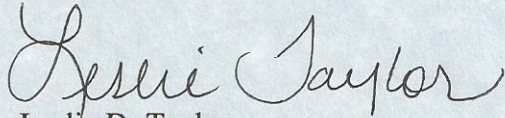
Additionally, the United States Supreme Court has already ruled that “federal regulations do not, indeed cannot, apply retroactively unless Congress has authorized that step explicitly.” See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). Given that the IGRA does not allow NIGC to promulgate retroactive regulations with respect to product safety standards, this should be stricken from the Discussion Draft.

Based on the foregoing, the Nation requests that the NIGC reconsider the five-year sunset clause and add language that will authorize the continued use of any Class II system component previously certified or validated through judicial proceeding. The Nation also requests that the regulation account for future certification of systems that have already been certified or approved by a federal court decision.

Finally, the Nation requests the NIGC to review the Discussion Draft's oversight as to invalidation of pre-existing certifications issued by the TGRA. The changes in the Discussion Draft pose additional requirements that will effectively “decertify” currently compliant Class II gaming systems. The Discussion Draft will impose new rules on previously certified productions that make it virtually impossible for any certification to remain valid in that certification is based on standards that were unavailable at the time of certification.

I look forward to meeting with you further to discuss the issues listed above.

Sincerely,

A handwritten signature in cursive script that reads "Leslie Taylor". The signature is written in dark ink and is positioned above the typed name.

Leslie D. Taylor
Attorney General
Delaware Nation

cc: President Kerry Holton, Tribal Administrator Orvel Gibson, Gaming Commission Members,
Lenape Entertainment Board of Directors