Ho-Chunk Nation Gaming Commission

P.O. Box 667, Black River Falls, WI 54615 • (715) 284-7474 • (800) 814-8050 • FAX (715) 284-7550

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Via Electronic Mail: reg.review@nigc.gov

Ms. Tracie L. Stevens, Chairwoman
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, D.C. 20005

Re: Preliminary Discussion Draft of 25 C.F.R. Part 543: Class II MICS; and 25 C.F.R. Part 547 Technical Standards

Dear Chairwoman Stevens:

The Ho-Chunk Nation wishes to thank the National Indian Gaming Commission for giving us the chance to offer comments on the Class II discussion drafts and further for extending the deadline to get comments in. The Nation offers the following generalized comments on the National Indian Gaming Commission's (NIGC) discussion draft of 25 C.F.R. Part 543, which set forth the Minimum Internal Control Standards (MICS) for Class II gaming. Following the comments on Part 543 there will be several comments on Part 547 Technical Standards.

GENERAL COMMENTS, 25 C.F.R. Part 543

One of the first items that becomes apparent when reading the discussion draft is that there seems to be some confusion about the role of the NIGC and the tribal gaming regulatory agency. The Nation recognizes that the NIGC has an oversight role regarding Class II gaming as conducted by tribes, but the main regulation itself comes directly from the tribe.

Section 543.3(a) of the discussion draft provides that tribal gaming regulatory agencies (TGRA's) may establish and implement additional controls since "TGRA's *also* regulate Class II gaming" (emphasis added). However, later in that same section, in §543.3(h)(2), the discussion draft

"recognize[es] that tribes are the primary regulator of their gaming operation(s)." In addition to being inconsistent, the first statement of the TGRA's regulatory authority runs contrary to the plain language in IGRA, which vests Indian tribes with "the exclusive right to regulate gaming activity on Indian lands." Moreover, §2706 (a)(2) of IGRA states that Class II gaming activities are under the jurisdiction of Indian tribes subject to certain provisions within IGRA. One of those provisions can be found in §2706 of IGRA, which vests the NIGC with the specific authority to "monitor," not regulate Class II gaming.

The Nation offers the suggestion that the language in the discussion draft be revised so that the provisions of the IGRA regarding Class II gaming are accurately portrayed.

Secondly, the Nation takes exception to the continued inclusion of §543.12, regarding promotions and player tracking systems, and §543.13 that deals with complimentary services. The Nation agrees with the Tribal Advisory Committee's (TAC) recommendation to eliminate these sections as they do not deal directly with gaming and thus should not fall under the purview of the federal governments. These areas are important to the Nation's (and other tribes) gaming businesses and can be regulated by the Tribal Gaming Regulatory Agency (TGRA). We consider it an affront to tribal sovereignty that the NIGC continues to include these areas in its discussion draft.

Next, the Nation feels that the overall approach and tone of the discussion draft MICS creates regulations that are static rather than fluid in nature. The discussion draft does not take into account changing circumstances and does not present the draft regulations in such a manner that they can grow with those changes such as technology and/or judicial interpretations of the law. The MICS as presented in the discussion draft would require a full overhaul and amendment to accommodate changes in circumstances surrounding Class II gaming.

The Nation has been regulating both Class II and III gaming for many years and has a comprehensive set of internal regulations. The Nation takes the position that when it comes to internal controls and their operation within the Class II gaming enterprises of the Nation that they are best suited to determine, within certain parameters, how the regulations should be developed within their own jurisdiction. Clearly all regulations need to protect the integrity of the games and safeguard the assets used in connection with the operation.

If the MICS stated that there had to be regulations and controls that addressed certain aspects or risks associated with bingo, pull tabs, surveillance, etc... (a risk-based approach), then the Nation would be somewhat free to develop regulations that achieve the goal of protecting the integrity of the games and safeguarding the assets used in connection with the operation and address any risks as ascertained by NIGC. However, the TGRA of the Nation would be able to fashion the regulations to more specifically meet the needs and circumstances of their own unique facilities and other tribes would be able to do this as well. The discussion draft as it currently exists is so loaded with regulatory and procedural requirements the TGRA's hardly have any flexibility in developing regulatory and procedural requirements that more closely fit their circumstances and still meet the ultimate goal of game integrity and safeguarding of assets.

The Tribal Advisory Committee (TAC) had suggested that the bulk of the regulations in a risk based approach as described above would actually be put into a guidance document that would not have the force of law but would provide assistance to tribes in following the regulations. The guidance documents would be especially useful for tribes that are just entering the gaming arena in developing their own sets of regulations. Furthermore, the Nation also agrees with the Tribal Advisory Committee that a set of guidance documents that do not have the force of law would be much easier for the NIGC to update as technology progresses and Class II gaming further develops. Unfortunately, the discussion draft does not appear to have taken any of those recommendations of the TAC.

Further, §543.5 of the discussion draft sets forth the requirements for a gaming operation to apply to use an alternate control standard from those contained in the draft. If the regulations were not so static there might not be as much use for this section as there would be some leeway within the discussion NIGC MICS to try to design regulations that differ more by tribe but still meet the same overarching goals set forth in the IGRA.

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

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

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

Lastly, the Nation feels that the distinction in the discussion draft between "manual" and "gaming system" bingo is wholly unnecessary. The discussion draft's distinction between "gaming system" bingo and "manual" bingo is an unprecedented departure from the well-accepted view and general consensus that "bingo is bingo". It is unclear why bingo is now being classified according to the technology being used when bingo has historically been treated as one type of gaming activity by both the NIGC and tribal governments. Dividing bingo into two separate sections, in addition to a myriad of other problems most importantly causes confusion.

The Nation suggests that the Class II MICS would be better served without the distinction between "manual" and "gaming system" bingo. In the event that the NIGC does not take this suggestion into account then at the very least the drafters of the document need to be consistent about what regulations and procedures are needed for these two distinctions. In the discussion draft as currently written there are some inconsistencies. For instance, in §543.8(e)(5)(ii), the regulation provides that "controls must include the number of agents required for authorization or signature for each predetermined level of payout," despite the fact that an earlier provision in the same section requires at least two agents to perform the validation and verification of a payout. Also, as drafted, the discussion draft contains several misplaced provisions that do not accurately reflect the type of bingo being conducted. For instance, §543.8(e)(3)(iv)(B) requires payout records to include a description of the event, including any *player interface malfunction,* despite the fact that the requirements set forth in §543.8 apply only to *manual* bingo, which does not involve any player interfaces.

Furthermore, some of the requirements for bingo games in both sections are impracticable or unnecessarily burdensome. For instance, §543.7(d)(3)-(4) require that two agents be present to verify every bingo pattern before a payout in *gaming system* bingo. Since the discussion draft prohibits computer systems from serving as the agent (see 25 C.F.R. §543.2 in the discussion draft) for purposes of this regulation, this means that two employees must be present to validate and verify every win on a gaming system. While we can certainly understand the need to validate and verify hand-pays in manual bingo, such a requirement seems unnecessarily burdensome in the gaming system context.

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

COMMENTS ON 25 C.F.R. PART 547: TECHNICAL STANDARDS

The Nation would like to acknowledge that the NIGC took into account many of the recommendations of the TAC in developing their discussion draft on §547.

However, the Nation does agree with the TAC in their opinion that the sunset "grandfather" provisions are unnecessary and further, that the five (5) year stipulations seem arbitrary. Further, this provision applies retroactively without providing any compelling reason for doing so. This provision stands to have a very detrimental economic impact on many tribes engaged in

Class II gaming. The NIGC should 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.

Additionally, we ask the NIGC to resolve a major oversight in the discussion draft which operates to invalidate pre-existing certifications issued by the TGRA. As drafted, the changes in the discussion draft pose additional requirements that will affect the certified status of currently compliant Class II gaming systems. More specifically, the discussion draft imposes new rules on previously certified products that make it virtually impossible for any certification to remain valid. There is an element of impossibility in maintaining certified status since certification is based on standards that were unavailable at the time of certification.

The last set of comments that the Nation has on the Technical Standards deals with §547.17. This section deals with the procedure for a TGRA to get a variance (now alternative standard) to the regulation in this Part. The TAC recommended that the term "variance" be changed to "alternative standard" and the NIGC did take that recommendation into consideration in their discussion draft. However, the TAC proposed language that left the power to approve any alternative standards within the TGRA. The Nation agrees with the TAC's suggestion. The TGRA is the primary regulator and should only have to notify NIGC and provide an explanation as to how the alternative standard will achieve a level of security and integrity sufficient to accomplish the purpose of the standard it is to replace. The Nation, through its TGRA should not have to wait for a possible objection from the Chair for sixty days or an additional sixty day extension for review. While the NIGC adopted the TAC's suggestion for the use of the term "alternative standard" they did not adopt the recommendation involving TRGA authority but rather left in their "old" language for the NIGC review of alternative standards.

The Nation once again wishes to thank the NIGC for allowing comments on the discussion draft and we hope that the NIGC will take our comments into consideration within their next draft of this document.

Sincerely,

Darren Brinegar, Chairperson

Kyle Fummaker, Secretary/Treasurer

Daniel Blumer, Commissioner

Joseph Decorah, Commissioner

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