Seneca Cayuga Gaming Commission
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August 14, 2012

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

Re: Comments on Proposed Rule: Class II Minimum Internal Control Standards, 25 C.F.R. Part 543

Dear Chairwoman Stevens:

On behalf of the Seneca-Cayuga Gaming Commission (SCGC), I am pleased to submit comments on the National Indian Gaming Commission's (NIGC) proposed rule implementing the Class II Minimum Internal Control Standards (MICS). The SCGC appreciates the opportunity to comment on the proposed changes to the Class II MICS, some of which implement the recommendations of tribal governments in response to the discussion draft preceding this proposed rule. As discussed in greater detail below, however, we believe that there are a number of remaining issues in the proposed rule that warrant the NIGC's further consideration. We have sought in our comments to suggest specific revisions to the proposed rule that would address these issues.

I. GENERAL CONCERNS

Alternative Regulatory Approach

As explained at length in earlier comments, one of our primary concerns with the proposed Class II MICS relates to its overly prescriptive and procedural approach to regulation which dictates the specific manner in which a control standard is to be met. We have advocated for a more flexible and less rigid alternative regulatory approach that will enable tribal gaming regulatory agencies to determine the most appropriate and effective methodology for meeting a particular standard based on a gaming operation's size, scope, gaming floor layout, and organizational structure. In the preamble to the proposed rule, however, the NIGC explains that it is reluctant to adopt an alternative regulatory approach to the Class II MICS because it "believes that the standards set forth in this part are both appropriate and sufficiently detailed to be implemented by tribes." Since no other explanation is offered, we are concerned that the NIGC may not fully appreciate our fundamental concerns with the proposed rule.

In the SCGC's view, the fundamental issue here relates to the appropriateness of the regulatory approach taken in the proposed rule and its emphasis on procedures and process rather than regulatory standards and intended outcomes. By focusing heavily on the specific methodology

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for achieving compliance, the proposed rule fosters an unnecessary rigidity within the Class II regulatory framework, which in turn can increase compliance costs and divert tribal resources away from innovation and investments. We urge the NIGC to revisit this important issue and reconsider the benefits of adopting an alternative regulatory approach that will ultimately prove more effective and less burdensome to implement.

Without question, a more flexible regulatory approach that allows tribal governments to develop and improve their internal controls and processes based on their particular circumstances is the optimal approach to the Class II MICS. An approach that establishes an overly rigid regulatory framework promotes inefficiencies and has a higher risk of quickly becoming outdated as industry practices evolve and new technologies are introduced. A regulation that has become outdated or incompatible with the industry's best practices can have significant adverse effects on a tribal gaming operation. In addition to increased compliance costs, outdated regulations make it substantially more difficult to integrate new technology and management improvements, both of which are critical to the success and viability of the tribal gaming industry.

In a technology-driven industry such as the gaming industry, it is critical for tribal governments to have the necessary flexibility to adopt, incorporate, and implement procedures that accommodate new technologies and industry best practices. In light of this, the overall goal of the Class II MICS should be to balance this flexibility with the need for a robust system of internal controls that safeguard the integrity of gaming activities and the revenues they produce. We believe our alternative regulatory approach helps accomplish this goal by making tribal governments responsible for establishing internal control procedures specific to the control standard set forth in the Class II MICS, and for monitoring and auditing such procedures as appropriate.

In contrast, the overly prescriptive regulatory approach in the proposed rule instructs tribal governments as to the specific methodology for achieving compliance and specifies, among other things, the title of the individual or department responsible for performing a specific task and the type of technology that must be used to carry out that task, without accounting for differences that may exist among tribal gaming operations. Thus, each revision of the Class II MICS will have to undergo the full rulemaking process which, as the NIGC is aware, can be a time-consuming and resource-intensive endeavor. We believe one of the key benefits of adopting a more flexible regulatory approach is that such an approach will minimize the need for the NIGC to conduct periodic reviews and updates of the Class II MICS, and help ensure that the Class II MICS remain timely and effective despite any changes in technology and/or industry best practices.

Use of Alternative Terminology and Organizational Structure

Alternatively, the NIGC could address the foregoing concerns by clarifying in the final rule that the regulations are not intended to require tribal governments to adopt a particular organizational

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structure or limit the use of alternative terminology, so long as the requisite control standards are met. Such clarification would address some of our concerns with the overly prescriptive nature of the current regulatory approach by ensuring that tribal governments have the necessary flexibility and discretion to determine the most appropriate organizational structure for complying with the Class II MICS requirements.

The overall objective of the Class II MICS is to provide minimum internal control standards for Class II gaming that will safeguard the integrity and security of tribal gaming operations, not to require a particular organizational structure in carrying out assigned tasks. MICS compliance should thus be based on whether the tribal government has satisfied the minimum internal control standard with an appropriate segregation of functions and independence; the title of the individual and/or department performing the necessary procedures to meet that standard should not raise any compliance issues. The final rule should provide tribal governments the necessary flexibility to use alternative terminology in their internal controls and procedures based on the particular circumstances of their gaming operations. We note that, as a practical matter, such clarification will help ensure that employees can understand and apply an operation's internal controls and procedures.

We therefore respectfully request that the final rule include a statement clarifying that the regulations are not intended to impose a particular organizational structure on tribal gaming operations or limit the use alternative terminology so long as the control standard is met.

II. SPECIFIC COMMENTS

§ 543.2: Definitions

The SCGC recommends that the NIGC consider several revisions to the Definitions section of the proposed rule. Specifically, we recommend the following revisions to the definitions of Cashless Transaction; Complimentary Services and Items; and Kiosk.

- Cashless Transaction: We believe a definition of "Cashless Transaction" should be added to clarify the meaning of a "Cashless System."

- Complimentary Services and Items: The NIGC should also consider including a definition of "Complimentary Services and Items" in the Definitions section of the proposed rule in order to distinguish such services and items from other general promotional or business expenditures.

- Kiosk: The SCGC further proposes that the definition of "Kiosk" be modified to more broadly reflect industry use. Any device which provides customer service functions without necessarily requiring the assistance of a live agent should be considered a kiosk.

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§ 543.3: Compliance

- § 543.3(h)(2): The SCGC requests that proposed § 543.3(h)(2) be amended to include the following language found in prior drafts of the proposed rule: "[r]ecognizing that tribes are the primary regulator of their gaming operation(s) . . . ." Under IGRA, TGRAs such as the SCGC are charged with primary regulatory responsibility over gaming operations within their jurisdiction. We believe this clear statement regarding the primary regulatory authority of TGRAs properly demonstrates the separation of regulatory and oversight functions under IGRA.

  The SCGC further requests that proposed section 543.3(h)(2) be modified to state that potential NIGC enforcement action may be initiated based on deficiencies in TICS rather than SICS. SICS are operational procedures of the tribal gaming operation and it is the responsibility of the TGRAs to ensure that those procedures comply with the TICS. The tribal government and TGRA work together to ensure that the TICS meet or exceed the requirements of the NIGC's MICS. The NIGC should make clear that when the NIGC initiates an enforcement action, it is due to a failure of the TICS to comply with the MICS stated in the final rule, and not in the SICS which may be tailored to a higher standard at the discretion of the tribal gaming operation. To provide otherwise is to potentially punish tribal gaming operations that may follow stricter procedures than are necessary to comply with the Class II MICS.

- Severability: The SCGC believes that the NIGC should reconsider omitting a severability clause within this section of the proposed rule. While the SCGC agrees that severability clauses do not ultimately compel a court to decide the issue of severability one way or the other, we believe the inclusion of a severability clause provides the benefit of clarifying the NIGC's intent with respect to severability.

- § 543.3(e): The SCGC recommends that proposed§ 543.3(e) be amended to provide that alternative documentation and/or procedures will be acceptable for any computer applications and/or alternative technologies used to provide at least the level of control established by the standards in the Part.

§ 543.8: Bingo

- § 543.8(c)(4): The SCGC requests that the NIGC examine proposed section 543.8(c)(4) to ensure that it does not inadvertently impose additional technical standards on Class II gaming system bingo. Specifically, the SCGC is concerned that references to the need to "record, track and reconcile sales" should explicitly apply only to manual bingo because electronic bingo does not involve inventory tracking of this nature.

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- § 543.8(d)(2)-(4): The SCGC believes that the "draw" provisions in proposed § 543.8(d)(2)-(4) should be revised to apply uniformly to server-based and manual bingo. The only regulatory distinction between the two forms of bingo is that Class II gaming systems are subject to 25 C.F.R. Part 547 Technical Standards. To that point, proposed § 543.8(d) should reflect that certification in accordance with 25 C.F.R. Part 547 is acceptable for meeting the control standards for bingo Draw rather than inserting the new concept of "verifying the randomness of the draw."

- § 543.8(e)(5)(i): The SCGC requests that proposed § 543.8(e)(5)(i) be amended to apply only when the amount of a manual prize payout exceeds a certain threshold approved by the TGRA. Requiring two agents to witness very small manual payouts prompted by equipment glitches, paper jams, etc. could be overly burdensome to smaller gaming operations.

- § 543.8(e)(6)(iv)(D): This provision requires agents to compare the amount of the prize on the player interface with the amount stated in the accounting system for all manual payouts. The SCGC is concerned that proposed § 543.8(e)(6)(iv)(D) could be read to require that the agent responsible for making manual payments must also be responsible for accessing the accounting system to reconcile potential differences with the player interface. However, depending on the tribal gaming operation, agents responsible for making manual payouts may not always have access to the accounting system. While the SCGC agrees that the player interface amount and accounting system amount must be reconciled by an authorized agent in order to determine if an override is necessary, we do not believe assigning this function to a different agent should present any compliance issues.

- § 543.8(g)(1): The SCGC is concerned that the level of detail used in prescribing the requirements for shipping and receiving may unnecessarily interfere with the SCGC's ability to establish shipping and receiving procedures. For instance, the requirement that certification in accordance with 25 C.F.R. Part 547 occur *prior* to shipment restricts the SCGC's ability to perform testing and certification pursuant to its own procedures. While we agree with the need to protect the integrity and security of Class II gaming product shipments, we believe the specific steps for shipping and receiving such products should be within the discretion of TGRAs.

- § 543.8(g)(5): Proposed § 543.8(g)(5) requires that certain testing "be completed during the installation process to verify that the player interface has been properly installed." We are concerned that this provision may inadvertently require additional testing of player interfaces beyond that which is already required under the Class II Technical Standards. We request that the specific testing requirement be removed from this section and replaced with a statement that requires compliance with all applicable testing requirements.

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- § 543.8(h)(1): We are very concerned with the level of detail used to prescribe the requirements for equipment malfunctions and removal, which fails to take into account the particular circumstances specific to each malfunction. There are a number of variables to consider in the event of an equipment malfunction, some of which may not always be addressed in the federal regulation. For instance, a gaming operation may have contractual obligations to take certain steps following a malfunction. Requiring specific steps by federal regulation makes it difficult for a gaming operation to respond in the most efficient and cost-effective manner. We believe that this provision should be amended to allow for greater flexibility at the operational and regulatory levels so long as proper procedures are in place to investigate, document and resolve malfunctions.

§ 543.10: Card Games

The SCGC requests that the phrase "and any other promotion, including related drawings and giveaway programs" be removed from this section to clarify that the requirements in this section apply to promotional progressive pots and pools only, not just any game involving pots and pools.

§ 543.12: Gaming Promotions and Player Tracking Systems

This section should be modified to reflect the primary role of the TGRA in establishing standards to govern gaming promotions and player tracking systems. While we understand the potential risks associated with player tracking systems and gaming promotions, we believe that, to the extent that such functions involve non-gaming activities, they belong within the regulatory authority of TGRAs.

§ 543.13: Complimentary Services or Items

We are concerned that the term "tracking" may be inappropriate and confusing when used in the context of complimentary services or items. For instance, it is unclear whether the items themselves must be tracked, or whether logs tracking their distribution need to be maintained. In addition, a requirement to track *all* complimentary services or items, regardless of their value, would be unnecessarily burdensome on the gaming operation. To address these concerns, we ask that the term "tracking" be replaced with the term "redemption."

§ 543.17: Drop and Count

Proposed § 543.17(c)(5) requires that count team agents be independent of the department being counted, as well as from the cage and vault departments. While we understand the importance of requiring proper independence and segregation of functions, we believe that this provision

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should be amended to state that a cage/vault agent may be used so long as the agent is not the sole recorder of the count and does not participate in transferring drop proceeds to the cage/vault.

§ 543.24: Revenue Audit

The SCGC proposes that the NIGC consider re-titling this section to reference "audits" in general rather than "revenue audit." This proposed section lists various general operational audit requirements that, while related to revenue, are not all usually performed by "revenue auditors." As most gaming operations and TGRAs have specific job titles and responsibilities for "revenue audit" team members and "revenue audit departments," leaving the title of this section as is may lead some revenue audit departments to believe that they must be involved in the audits referenced in this proposed section as a matter of compliance. We note that this concern may be addressed by incorporating our recommended clarification that the Class II MICS does not intend to impose a particular organizational structure, and that alternative terminology may be used.

III. CONCLUSION

In closing, the SCGC wishes to thank the NIGC for this opportunity to submit comments on the proposed rule. We seek the NIGC's favorable consideration of the above comments and urge the NIGC to consider a regulatory course that accomplishes the purposes and goals of IGRA in a manner that is fair, reasonable, and equitable.

Sincerely,

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Richard Wood
Gaming Commissioner
Seneca-Cayuga Gaming Commission