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

Re: Comments on Notice of Proposed Rulemaking of 25 C.F.R. Part 518 – Self-Regulation of Class II Gaming

Dear Chairwoman Stevens:

The Quapaw Tribal Gaming Agency ("QTGA") appreciates the opportunity to provide comments on the National Indian Gaming Commission's ("NIGC") Notice of Proposed Rulemaking of 25 C.F.R. Part 518 – Self-Regulation of Class II Gaming. The QTGA recognizes and appreciates the NIGC's efforts to engage each tribe in meaningful government-to-government consultation during this regulatory review process, and submits the following comments, with cooperation intended.

Until recently, the NIGC's self-regulation program has been largely ignored or disregarded as impractical due to its difficult petition requirements, the significant costs in maintaining a certificate of self-regulation, and the limited benefits of becoming a self-regulating tribe. This may be surprising with the general shift towards tribal self-governance and determination that has been taking place in the context of federal Indian law and policy. For instance, since the initiation of the first self-governance agreement, about twenty years ago, the number of tribes operating and managing their own programs under the self-governance program has steadily increased. As of 2010, there were 260 self-governance tribes within the Department of the Interior – Bureau of Indian Affairs and 331 self-governance tribes within the Department of Health and Human Services – Indian Health Service.

As it has been for many years, only two tribes have completed the requirements to receive a certificate of self-regulation from the NIGC under the self-regulation program. As these statistics show, the current regulatory approach to self-regulation has been fundamentally ineffective in helping tribes realize the potential and promise of self-regulation authority. Such an outcome is contrary to Congress' intent to encourage tribal participation by rewarding those tribes operating and regulating Class II gaming on a standard of excellence with less federal oversight.

The QTGA believes that a regulatory overhaul of the self-regulation program is necessary to encourage tribal participation and bring the program closer to the purposes and goals of IGRA.

This regulatory review process is the perfect opportunity for the NIGC to take a fresh look at the self-regulation program and remove any regulatory language that may hinder tribes from achieving the desirable goal of self-regulation.

In reviewing the proposed rule, the QTGA is disappointed that the proposed rule includes only relatively minor revisions to the prior draft, and not the wholesale revisions requested by tribes during the discussion draft comment period. While the proposed rule is a positive step in the right direction, it falls short in many respects and fails to adequately resolve many of the shortcomings of the current regulation. In particular, the eligibility requirements and criteria for receiving a certificate of self-regulation have not been changed in any substantive way; they continue to lack any meaningful guidance as to how a petitioning tribe can satisfy the eligibility requirements and criteria for self-regulation. Also, the same basic deficiency underlies the procedures for reviewing and certifying a tribe's petition since the proposed rule fails to address the rigid approval or denial approach to reviewing petitions.

Until the NIGC allows the self-regulation program to function in the manner intended by Congress, tribes will continue to be discouraged from exercising their statutory right to attain self-regulation status. Therefore, we hope our comments below are helpful in identifying remaining issues in the proposed rule and implementing additional revisions that will help bring the self-regulation program closer to the purposes and goals of the self-regulation program under IGRA.

ANY SUBMISSION REQUIREMENT THAT IS NOT DIRECTLY RELATED TO A TRIBE'S CAPACITY FOR SELF-REGULATION SHOULD BE REMOVED.

The QTGA agrees with the NIGC's position that all submission requirements must be directly related to the capacity and strength of a tribe's regulatory framework. The primary objective in revising these regulations should be to eliminate any submission requirement that does not indicate whether a tribe has been successfully regulating its gaming activities during the required three-year period.

While we appreciate the NIGC's proposed removal of certain submission requirements from the regulation, we believe further revisions are necessary to ensure that each and every requirement is directly related to the capacity and strength of a tribe's regulatory framework. For instance, the NIGC is still requiring tribes to submit a list of current regulators and employees of the tribal regulatory body, along with their complete resumes, titles, employment dates, and expiration dates in proposed § 518.4(c)(v). If the objective is to assess the strength of a tribe's regulatory capacity, it is unclear how the resumes of tribal regulatory agency employees will be useful in that regard. The QTGA believes that the competence of individual staff members of a tribal regulatory agency is a matter of tribal law and should not be subject to federal review.

In addition, proposed § 518.4(c)(vii) requires the submission of "a list of gaming activity internal controls at the gaming operation(s)." The QTGA believes that a requirement for a listing of all gaming internal controls is not only burdensome but also unnecessary since it provides little to no insight as to the tribe's capacity for self-regulation. In any event, since a tribe's internal control standards are evaluated against the NIGC's Minimum Internal Control Standards in the yearly audit submitted to the NIGC, it is unclear what new information or insight can be gained

from reviewing internal control standards that have already been reviewed by an independent CPA.

In sum, the QTGA asks that the NIGC carefully review the submission requirements listed in proposed § 518.4 to ensure that each and every requirement is directly related to evaluating a tribe's eligibility for self-regulation status.

THE CRITERIA FOR RECEIVING A SELF-REGULATION CERTIFICATE IS OVERLY VAGUE AND BASED ON SUBJECTIVE FACTORS.

An effective self-regulation program should establish clear objective standards in a manner that encourages tribal participation and provides insight and guidance as to how such standards can be achieved. Section § 518.5(a) of the proposed rule, however, suffers from the same deficiencies as the current regulation in that the criteria set remains inundated with subjective terms that do not provide any meaningful guidance as to how they will be interpreted by the NIGC. Without greater objectivity, the subjective terms used in proposed § 518.5 give the NIGC tremendous discretion in deciding whether a petition should be approved.

As part of its rulemaking authority, the NIGC is responsible for filling IGRA's statutory gaps so that tribes are better informed as to how the NIGC will implement its statutory mandates. This section, however, is full of such gaps needing to be filled in a fair and reasonable manner. The language in proposed § 518.5(a)(1)-(4) is especially problematic because it merely tracks, almost word for word, the criteria set forth in IGRA. To be effective, regulations must do more than simply restate what the statute requires; the rulemaking process should result in regulations that provide meaningful guidance to readers as to how a statutory method will be implemented by the agency.

Moreover, the proposed rule makes the certification process even more difficult by imposing numerous additional requirements or "factors" in proposed § 518.5(b), some of which exceed the statutory requirements for the conduct of tribal gaming. For instance, while it has now become common practice for tribal regulatory agencies to license or permit vendors, there is no such mandate in IGRA. The reference to vendor licenses in proposed § 518.5(b)(ix) should therefore be removed since the licensure of vendors is a matter of tribal not federal law.

THE REVIEW AND CERTIFICATION PROCESSES SHOULD BE INFORMAL ENOUGH TO ENCOURAGE TRIBES TO CONTINUE STRIVING FOR SELF-REGULATION.

One of our primary concerns with the self-regulation program is the rigid approach to approving or denying petitions for self-regulation without consideration of more informal and collaborative measures that encourage tribes to continue striving for self-regulation. Under the proposed rule, if the NIGC issues a final decision denying a tribe's petition after a hearing, such decision is deemed a final agency action, which leaves the petitioning tribe with no recourse but to appeal the decision to a federal court. However, in our view, we believe a more effective approach than simply issuing a denial would be for the NIGC to work with the tribe in resolving the underlying issues for denial so that the tribe can eventually be accepted into the self-regulation program at a future time. The NIGC should keep in mind that the overall objective of the self-regulation

program is to motivate tribes to develop sound, effective regulatory frameworks and to "reward" such tribes with less federal oversight.

Thus, the QTGA recommends removing references to final agency action in the proposed rule, specifically, in proposed § 518.7(f), which states that the "decision of the Commission to approve or deny a petition shall be final agency action." Decisions regarding self-regulation petitions should never be treated as a final agency action since the designation as such either terminates the process or sets up an adversarial process of appeal. The QTGA also recommends including additional procedures that will allow for a more informal and collaborative certification process. Rather than issuing preliminary determinations, the NIGC could instead rely on intergovernmental agreements outlining in a step-by-step format the actions needed to ultimately attain self-regulation status. Additionally, the NIGC could replace its hearing procedures with procedures for conducting informal meetings with the tribe to discuss deficiencies in the petition and the steps necessary to resolve such deficiencies.

COMPLIANCE WITH 25 C.F.R. PARTS 556 AND 558 SHOULD BE SUFFICIENT IN SATISFYING ANNUAL SUBMISSION REQUIREMENTS.

The QTGA strongly supports the proposed change to remove the controversial annual reporting requirement of the tribe's usage of its net gaming revenues. Rather than a benefit of becoming a self-regulating tribe, this requirement operated as a penalty imposed only on self-regulating tribes. The QTGA is pleased that the annual submission requirements under the proposed rule now more closely reflect the annual submission requirements set forth in IGRA.

We note, however, that because all tribes must comply with the NIGC's background and licensing regulations in 25 C.F.R. Parts 556 and 558, the NIGC already has in its possession suitability reports of all employees who are licensed by the tribal gaming regulatory agency. So long as the tribe is in full compliance with 25 C.F.R. Parts 556 and 558, the NIGC should consider that information as sufficient in satisfying the annual submission requirements.

TRIBES WITH SELF-REGULATION CERTIFICATES SHOULD BE ALLOWED A REASONABLE TIMEFRAME TO REPORT ANY CHANGED CIRCUMSTANCES THAT AFFECT THE TRIBE'S CAPACITY FOR SELF-REGULATION.

The QTGA disagrees with the proposed change to replace the general timeframe for reporting any material changes from "immediately" to "three business days" in proposed § 518.11. It is unclear why a more precise timeframe of three business days is necessary or how it will benefit either the self-regulating tribe or the NIGC. Our concern is that a specific timeframe of three business days is too short and may be burdensome for tribes that may otherwise be able to address the underlying issue on their own. Tribes, as primary regulators of their gaming activities, should be allowed sufficient time to resolve any issues on their own in the first instance.

Also, the QTGA disagrees with the examples of "circumstances" that may constitute material changes to the approval criteria as they do not directly relate to the criteria for self-regulation or the tribe's regulatory capacity. For example, a circumstance of "financial instability" can be construed to cover a whole host of potential and actual financial issues, most of which are

unrelated to the tribe's regulatory capacity. Also problematic is the "change in management contractor" example, which is not only irrelevant for purposes of the criteria for self-regulation, but also unnecessary since the NIGC is responsible for conducting background investigations of management contractors and will thus already have in its possession the requested information.

CONCLUSION

In closing, the QTGA would like to commend the NIGC for its efforts to strengthen the government-to-government relationship with tribes. We hope the comments provided above are helpful during this regulatory review process.

Sincerely,

Barbara Kyser-Collier

Barbara Kyser-Collier
Director, QTGA