

to ensure that terminated users do not have access to system functions.

(vi) Documentation of the quarterly user access review must be maintained.

(vii) System exception information (e.g., changes to system parameters, corrections, overrides, voids, etc.) must be maintained.

(4) Procedures must be established and implemented to ensure access listings are maintained which include at a minimum:

(i) User name or identification number (or equivalent); and

(ii) Listing of functions the user can perform or equivalent means of identifying same.

(d) Adequate backup and recovery procedures must be in place that include:

(1) Daily backup of data files—(i) Backup of all programs. Backup of programs is not required if the program can be reinstalled.

(ii) Secured storage of all backup data files and programs, or other adequate protection to prevent the permanent loss of any data.

(iii) Backup data files and programs may be stored in a secured manner in another building that is physically separated from the building where the system's hardware and software are located. They may also be stored in the same building as the hardware/software as long as they are secured in a fireproof safe or some other manner that will ensure the safety of the files and programs in the event of a fire or other disaster.

(2) Recovery procedures must be tested on a sample basis at least annually with documentation of results.

(e) Access records. (1) Procedures must be established to ensure computer access records, if capable of being generated by the computer system, are reviewed for propriety for the following at a minimum:

- (i) Class II gaming systems;
- (ii) Accounting/auditing systems;
- (iii) Cashless systems;
- (iv) Voucher systems;
- (v) Player tracking systems; and
- (vi) External bonusing systems.

(2) If the computer system cannot deny access after a predetermined number of consecutive unsuccessful attempts to log on, the system must record unsuccessful log on attempts.

(f) Remote access controls. (1) For computer systems that can be accessed remotely, the written system of internal controls must specifically address remote access procedures including, at a minimum:

(i) Record the application remotely accessed, authorized user's name and business address and version number, if applicable;

(ii) Require approved secured connection;

(iii) The procedures used in establishing and using passwords to allow authorized users to access the computer system through remote access;

(iv) The agents involved and procedures performed to enable the physical connection to the computer system when the authorized user requires access to the system through remote access; and

(v) The agents involved and procedures performed to ensure the remote access connection is disconnected when the remote access is no longer required.

(2) In the event of remote access, the information technology employees must prepare a complete record of the access to include:

(i) Name or identifier of the employee authorizing access;

(ii) Name or identifier of the authorized user accessing system;

(iii) Date, time, and duration of access; and

(iv) Description of work performed in adequate detail to include the old and new version numbers, if applicable of any software that was modified, and details regarding any other changes made to the system.

Dated: September 24, 2008.

**Philip N. Hogen,**  
*Chairman.*

**Norman H. DesRosiers,**  
*Vice Chairman.*

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## DEPARTMENT OF THE INTERIOR

### National Indian Gaming Commission

#### 25 CFR Part 547

RIN 3141-AA29

#### Technical Standards for Electronic, Computer, or Other Technologic Aids Used in the Play of Class II Games

**AGENCY:** National Indian Gaming Commission, Interior.

**ACTION:** Final rule.

**SUMMARY:** The rule adds a new part to the Commission's regulations establishing technical standards for Class II games—bingo, lotto, other games similar to bingo, pull tabs, and "instant bingo"—that are played using "electronic, computer, or other technologic aids" as parts of a Class II gaming system. The rule establishes a process for ensuring the integrity of such games and aids—examination by

an independent testing laboratory and approval by the tribal gaming regulatory authority—before being made available to the public for play in a tribal gaming operation. The standards will assist tribal gaming regulatory authorities and operators in ensuring the integrity and security of Class II gaming and the accountability of Class II gaming revenue. The standards will also provide guidance to equipment manufacturers and distributors of Class II gaming systems.

The rule does not attempt to distinguish Class II gaming from Class III gaming. Rather, the rule assumes that the games played on Class II gaming systems are, in fact, Class II.

**DATES:** Effective November 10, 2008.

**FOR FURTHER INFORMATION CONTACT:** Michael Gross, Associate General Counsel, General Law, Office of General Counsel, National Indian Gaming Commission, 1441 L St., NW., Suite 9100, Washington, DC 20005, telephone: 202.632.7003. This is not a toll-free call.

#### SUPPLEMENTARY INFORMATION:

#### Withdrawal of Classification Standards and Amendment to Definition of Facsimile

The Commission has withdrawn the Classification standards it proposed on October 24, 2007. "Classification Standards for Bingo, Lotto, Etc. as Class II Gaming When Played Through an Electronic Medium Using 'Electronic Computer, or Other Technologic Aids.'" 72 FR 60483. The Commission has also withdrawn the amendment to the definition of "electronic or electromechanical facsimile," also proposed on October 24, 2007. "Definition for Electronic or Electromechanical Facsimile." 72 FR 60482. See the Commission's notices of withdrawal, published simultaneously.

#### Background

The Indian Gaming Regulatory Act, 25 U.S.C. 2701-21 ("IGRA"), enacted by the Congress in 1988, establishes the National Indian Gaming Commission ("Commission") and sets out a comprehensive framework for the regulation of gaming on Indian lands. IGRA establishes three classes of Indian gaming.

"Class I gaming" means social games played solely for prizes of minimal value or traditional forms of Indian gaming played in connection with tribal ceremonies or celebrations. 25 U.S.C. 2703(6). Indian tribes regulate Class I gaming exclusively.

"Class II gaming" means the game of chance commonly known as bingo, whether or not electronic, computer, or

other technologic aids are used in connection therewith, including, if played in the same location, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, as well as various non-house-banked card games. 25 U.S.C. 2703(7)(A). Specifically excluded from Class II gaming are banking card games such as blackjack, electronic or electromechanical facsimiles of any game of chance, and slot machines of any kind. 25 U.S.C. 2703(7)(B). Indian tribes and the Commission share regulatory authority over Class II gaming. Indian tribes can engage in Class II gaming without any state involvement.

“Class III gaming” includes all forms of gaming that are not Class I gaming or Class II gaming. 25 U.S.C. 2703(8). Class III gaming thus includes all other games of chance, including lotteries and most forms of casino gaming, such as slot machines, roulette, and banking card games like blackjack. Class III gaming may be conducted lawfully only if the tribe and the state in which the tribe is located enter into a tribal-state compact for such gaming. Alternatively, a tribe may operate Class III gaming under gaming procedures issued by the Secretary of the Interior. Indian tribes, states, and the Commission exercise regulatory authority over Class III gaming. In addition, the United States Department of Justice possesses exclusive criminal, and certain civil, jurisdiction over Class III gaming on Indian lands.

The Commission has determined that it is in the best interests of Indian gaming to adopt technical standards that govern the implementation of electronic, computer, and other technologic aids used in the play of Class II games because no such standards currently exist. The rule seeks to provide a means for tribal gaming regulatory authorities and tribal operators to ensure that the integrity and security of Class II games played with the use of electronic, computer, or other technologic aids is maintained and that the games and aids are fully auditable, *i.e.*, that they provide a means for the gaming authority and gaming operation to account for all gaming revenue. The rule also seeks to permit flexibility in the implementation of technology and to embrace the development of future technologies unforeseen and undeveloped.

#### Development of the Rule

The development of the rule began formally with the March 31, 2004, appointment of an advisory committee comprised of tribal government

representatives with substantial experience and expertise in gaming regulation and operations, the Commission, and Commission staff. Although the Commission initially intended to develop one set of regulations, this committee's work ultimately resulted in the Commission's publication of a proposed rule for Class II classification standards, 71 FR 30238 (May 25, 2006), and a separate proposed rule for Class II technical standards, 71 FR 46336 (August 11, 2006). A detailed history of the advisory committee's work on the technical standards to that point, its meetings, the Commission's consultations with Indian tribes, and the contributions and participation of the interested general public is published in the preamble to that proposed rule. 71 FR 46336–46337 (August 11, 2006).

The ultimate goal of that first proposed set of technical standards was as it is here—to ensure the security and integrity of Class II games played with technologic aids, to ensure the auditability of the gaming revenue that those games earn, and to account and allow for evolving and new technology.

Given the importance of the regulations to the industry, the Commission, which had initially set a comment period of 45 days, reopened the comment period for an additional 76 days, from November 15, 2006, through January 31, 2007. 71 FR 71115 (December 8, 2006); 71 FR 76618 (December 21, 2006).

Public comments made it clear to the Commission that the first set of proposed technical standards fell short of its goal of technological flexibility. In particular, commenters stated that the first set of proposed technical standards would mandate particular implementations of technology that were not practical or feasible. Commenters suggested that rather than prescribe particular implementations of technology, the standards should describe the regulatory outcomes that the Commission seeks to achieve and leave it to the industry to develop ways to meet those regulatory requirements.

At a December 5, 2006, advisory committee meeting in Washington, DC, the tribal representatives to the advisory committee strongly agreed with this sentiment. The details of the solution, however, were not immediately apparent. Before providing further advice to the Commission, the tribal representatives on the committee wished to consult further with other tribal representative and regulators, and with industry representatives. They therefore suggested that they assemble a working group made up of representatives from the Class II gaming

industry—tribal operators, tribal regulators, and manufacturers alike—to assist the advisory committee. The Commission agreed to allow the tribal representatives to work independently of the Commission to redraft the technical standards. Accordingly, the Commission withdrew the first proposed technical standards. 72 FR 7360 (February 15, 2007).

The tribal representatives to the advisory committee formed a working group, which met at various times, in person and telephonically, from the end of 2006 through the middle of 2007 to draft this new set of technical standards. The Commission did not participate in the establishment of this working group or in most of its work. On some occasions, the tribal representatives invited the participation of Commission staff members to answer questions and to provide explanation about the Commission's regulatory goals. Commission staff participated in this capacity during in-person meetings on December 11–12, 2006, in Las Vegas, Nevada, and June 5, 2007, in Dallas, Texas.

The full advisory committee, including the Commission, met to discuss drafts developed by the tribal representatives and the working group on February 22, 2007, in Albuquerque, New Mexico; April 26, 2007, in Seattle, Washington; and May 22, 2007, in Bloomington, Minnesota. All of these meetings were open to the interested public.

The NIGC published its Government-to-Government Tribal Consultation Policy on March 24, 2004, 69 FR 16973. In that policy the Commission recognized the government-to-government relationship that exists between the NIGC and federally-recognized tribes and stated that the primary focus on the NIGC's consultation policies would involve consulting with individual tribes and their recognized governmental leaders. The Commission's consultation policy also calls for providing early notification to affected tribes of any regulatory policies prior to a final agency decision regarding their formulation or implementation.

Accordingly, throughout this entire period, the Commission maintained a busy consultation schedule, consulting with tribal governments and gaming commissions, usually at gaming association meetings across the country but also at the Commission's Washington, DC, headquarters. From September 2005 through December 2007, and excluding consultations devoted solely to the Commission's Class II classification standards, the

Commission issued 751 invitations to tribes for consultation. These invitations resulted in consultations with 189 tribes or their gaming commissions. The tribes were invited to discuss the proposed technical standards, among other current issues.

In addition, in July and August 2006, the Commission consulted with 69 tribes and tribal gaming commissions in Washington, DC; Bloomington, Minnesota; Oklahoma City, Oklahoma; Tacoma, Washington; and Ontario California. These consultations were devoted primarily to discussing the proposed Classification standards. However, a few tribes took the opportunity to discuss the proposed technical standards as well.

The Commission is immensely grateful to all who contributed to the technical standards: The tribes and gaming commissions who took the time and made the effort to consult; the tribal representatives on the advisory committee and the working group of tribal leaders, tribal regulators, and manufacturers; and all of the commenters who contributed their insight in comments. The proposed rule published in October 2007 was substantially adopted from the draft of descriptive technical standards that the tribal representatives on the advisory committee delivered to the Commission.

There are some places where the Commission felt it could not accept the recommendations in the draft, and the October 2007 proposed rule contained some standards more stringent than the tribal representatives to the advisory committee would have preferred and some that the tribal representatives thought unnecessary. These differences are discussed in detail in the comment section, below.

### **Purpose and Scope**

Part 547 (“the Technical Standards”) applies to all Class II games played using electronic, computer, or other technologic aids, or modifications of such games and aids. Class II games played through such technologic aids are widely used in Indian gaming operations, yet no uniform standards exist to govern their construction, function, or implementation. The rule seeks to remedy that absence and create a regulatory structure under which tribal gaming regulatory authorities and tribal operators are able to ensure the integrity and security of Class II games played with the use of electronic, computer, or other technologic aids and of Class II gaming revenue.

There is a great variety in the technologic aids used in the play of Class II games and, therefore, a great

variety in the means used to play the games. An operation may, for example, play bingo using no aids at all. A caller may select numbers using ping pong balls taken from a hopper, and players purchase paper cards from an employee of the operation and mark them with an inked dauber. Alternatively, numbers may be selected randomly using an electronic random number generator, which in turn displays the selected number on a display board. Instead of paper, players may use electronic handheld devices to monitor and mark their cards. The handheld devices are purchased and have cards loaded on them at a point-of-sale retail terminal.

Still again, bingo may be implemented wholly electronically on client-server architectures. A common arrangement, but by no means the only one possible, is to have client machines on the casino floor as electronic player stations. These display the cards, allow the player to cover numbers when drawn, and pay any prizes won. Credits may be placed on the electronic player station by inserting cash or electronically drawing down an account separately established. The server, usually located off the floor, draws random numbers and passes them along data communications lines to the client machines for game play.

The challenge, then, for writing technical standards is to address all of the various ways that Class II games can be played. Central to the Technical Standards, therefore, is the definition of “Class II gaming system,” which refers to the collection of components used in the play of a Class II game: “All components, whether or not technologic aids in electronic, computer, mechanical or other technologic form, that function together to aid the play of one or more Class II games, including accounting functions mandated by these regulations.” The notion of the “gaming system” thus encompasses bingo played in all of the implementations described above.

It is the “gaming system” that must meet the requirements of the Technical Standards. Like the gaming system itself, the Technical Standards are conceived generally so that they may be met by a gaming system, regardless of the particular components that may comprise it. For example, the Technical Standards do not refer to “bill validators,” electronic devices into which a patron may insert a bill in order to place credits on a gaming machine. Instead, the Technical Standards describe “financial instrument acceptors” and the standards they must meet. “Financial instrument acceptor” is broad enough in meaning to

encompass not only a “bill validator” but also a cash drawer staffed by an employee of the gaming operation. The Technical Standards provide minimum standards for the security of the “acceptors” and of the money or vouchers (generally, “financial instruments”) they accept.

In the past, when Class II gaming systems did not make use of as many sophisticated electronic components as they do now, there was less need for technical standards. Now that technology has come so far and been implemented in Class II gaming to such a great extent, playing a direct role in the outcome of Class II games, technical standards, independent laboratory analysis, and tribal gaming regulatory authority approval are essential parts of gaming regulation.

However, because of the breadth of possible implementations for Class II gaming systems, the Technical Standards require that gaming equipment and software used with Class II gaming systems meet only those requirements that are applicable to the system as implemented. This is, in short, a rule of construction of common sense. For example, if a system takes only cash and lacks the ability to print or accept vouchers, then any standards that apply to vouchers do not apply.

The Technical Standards are deliberately only minimum standards. Tribes and tribal gaming regulatory authorities may add any additional requirements, or more stringent requirements, needed to suit their particular circumstances.

In order to ensure compliance, the Technical Standards borrow from the established practices of tribal, state, and provincial gaming jurisdictions across North America for handling other technologically sophisticated electronic gaming devices. The Technical Standards establish, as a necessary prerequisite to a gaming system being offered to the public for play, review of the system by a qualified, independent testing laboratory and approval by the tribal gaming regulatory authority.

Under the Technical Standards, a tribe’s gaming regulatory authority will require all Class II gaming systems, or modifications thereof, to be submitted to a testing laboratory for review and analysis. That submission includes a working prototype of the gaming system or modification, all pertinent software, and anything else the testing laboratory needs for its complete and thorough review. In turn, the laboratory will review whether the gaming system does or does not meet the requirements of the Technical Standards, as well as any additional requirements adopted by the

tribe's gaming regulatory authority. The laboratory will provide a written report of its analysis and conclusions to the tribal gaming regulatory authority to aid its approval or disapproval of the gaming system or modification. The tribal gaming regulatory authority will retain the report as long as the gaming system or modification in question remains available to the public for play. This process will help assure the integrity and security of Class II gaming technology.

#### *Five-Year Grandfather and Transition Period*

The Commission understands that existing Class II gaming systems likely do not meet all of the requirements of the Technical Standards. In order to avoid any potentially significant economic and practical consequences of requiring immediate compliance, the Technical Standards implement a five-year "grandfather period" for existing gaming systems.

Existing gaming systems—those in play or manufactured by the effective date of the Technical Standards—may be grandfathered and exempt from compliance with the Technical Standards for five years if they are put through a similar review by a qualified independent testing laboratory and approved by a tribal gaming regulatory authority. Specifically, in order to be eligible for grandfathering, a gaming system must be submitted to a testing laboratory within 120 days of the Technical Standards' effective date. The testing laboratory must review the gaming system for compliance with a specific, minimum set of requirements—random number generation, minimum probabilities, no reflexive or secondary decision-making after random numbers are drawn, the inability to change bingo cards during the play of a game, and a mechanism for verifying game software.

The laboratory must issue a report on these issues to the tribal gaming regulatory authority, which must make a finding that the gaming system qualifies for grandfather status. Once a gaming system is qualified, the manufacturer must label each player interface on the system with its date of manufacture and certify the same to the tribal gaming regulatory authority. This requirement effectively freezes the number of grandfathered interfaces in use.

The 120-day requirement applies only to the submission of the gaming system for testing. There is no requirement in the technical standards that the testing laboratory test the system, or the tribal gaming regulatory authority approve it

as a grandfathered system, within that time period. It is, nonetheless, in the interest of gaming operations for the testing laboratory to complete its evaluation and for the tribal gaming regulatory authority to issue its grandfather certifications as quickly as possible. The Technical Standards require both of those things to occur before a Class II gaming system is grandfathered and available to the public for play.

All of this is not to say, however, that the Technical Standards require grandfathered gaming systems to remain entirely static. Tribal gaming regulatory authorities may permit modifications to gaming system software or hardware that increases compliance with the requirements of the Technical Standards, even if the modifications do not make the system wholly compliant. Tribal gaming regulatory authorities may also authorize modifications to gaming system software that do not detract from, compromise, or prejudice the proper functioning, security or integrity of the Class II gaming system and the system's overall compliance with the requirements of the Technical Standards. Changes such as new pay tables, new game themes, and new entertaining displays fall within this latter category.

#### *Withdrawal of the Classification Standards*

Finally, the October 2007 proposed rule was not intended to stand alone. The advisory committee pointed out, and the Commission agreed, that many of the functions placed in the technical standards proposed on August 11, 2006, and subsequently withdrawn, were more properly characterized as minimum internal control standards. Accordingly, along with the proposed technical standards, the Commission published, as a separate proposed rule, a companion set of minimum internal control standards for the play of bingo and games similar to bingo. Those two proposed rules were to be applied in conjunction with proposed classification standards. The final Technical Standards are not so intertwined.

The Commission has withdrawn the classification standards (see notice of withdrawal published simultaneously) and has removed all cross references from the Technical Standards to the classification standards. Compliance with the classification standards is not required for compliance with the Technical Standards.

#### *Class II MICS*

Similarly, the Commission is adopting as 25 CFR part 543, the companion set of internal controls for bingo and games similar to bingo. The Commission has endeavored to place all requirements for the design, construction, and implementation of Class II gaming systems into the Technical Standards and all requirements for the operation of bingo gaming systems and the authorization, recognition, and recordation of gaming and gaming-related transactions into the MICS. In this sense, the two rules are independent of one another.

Nevertheless, there are places where the two rules bump up against one another—for example, in circumstances where equipment must have certain features to allow the application of appropriate internal controls. In those cases, a cross reference from one set of regulations to the other is appropriate. Similarly, the grandfather provisions of Technical Standards cross reference the MICS in a few places where tribal gaming regulatory authorities may permit hardware and software changes to a grandfathered Class II gaming system when those changes will improve compliance with the Technical Standards or the MICS.

#### **Regulatory Matters**

##### *Regulatory Flexibility Act*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of the Technical Standards on small entities, "small entity" is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

Indian tribes and tribal casinos do not meet this definition. Tribes are excluded from the governmental jurisdictions listed under (2), and tribally owned casinos are not ordinary commercial

activities but are tribal governmental operations.

In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

As a practical matter, the economic impacts of the Technical Standards will fall primarily upon the Indian tribes. The Technical Standards impose some direct costs upon gaming tribes—regulatory compliance costs, for example. In addition, as the ultimate customers, costs initially borne by testing laboratories and gaming manufacturers will be passed along. Accordingly, the Commission certifies that this action will not have a significant economic impact on a substantial number of small entities.

#### **Small Business Regulatory Enforcement Fairness Act**

When the Technical Standards were proposed in October 2007, the Commission proceeded as if they were a major rule under 5 U.S.C. 804.2, the Small Business Regulatory Enforcement Fairness Act. The Commission did so because the status of the proposed technical standards, considered alone—apart from the classification standards (proposed part 546), the proposed amended definition of 25 CFR 502.8, and the proposed MICS (proposed part 543)—was unclear. The Commission had commissioned an economic impact study of the proposals taken together, and it made clear that the cost to the Indian gaming industry of complying with the combined proposed rules would have an annual effect on the economy of \$100 million or more. Accordingly, the Commission treated the proposed technical standards as a major rule.

In so proceeding, the Commission was required to undertake a cost-benefit analysis, and, in doing so, evaluated the costs of each proposed rule individually. The Commission has found that the annual cost to the Indian gaming industry of the Technical Standards, considered alone, is \$3.1

million dollars. The cost of the Technical Standards and the Class II MICS taken together is less than \$10 million annually. Accordingly, the Technical Standards are not a major rule within the meaning of 5 U.S.C. 804.2, the Small Business Regulatory Enforcement Fairness Act.

The Commission's cost-benefit analysis is available for review at the Commission's Web site, [www.nigc.gov](http://www.nigc.gov), or by request using the addresses or telephone numbers, above.

#### **Unfunded Mandates Reform Act**

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 658(1); 1502(1).

#### **Takings**

In accordance with Executive Order 12630, the Commission has determined that the Technical Standards do not have significant takings implications. A takings implication assessment is not required.

#### **Civil Justice Reform**

In accordance with Executive Order 12988, the Commission's Office of General Counsel has determined that the Technical Standards do not unduly burden the judicial system and meet the requirements of sections 3(a) and 3(b)(2) of the Order.

#### **Paperwork Reduction Act**

The Technical Standards require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.* The title, description, and respondent categories are discussed below, together with an estimate of the annual information collection burden.

*Title:* Process for Certification of Electronic, Computer, or other Technologic Aids used in the play of Class II games and process for qualification of independent testing laboratories, proposed 25 CFR 547.4.

*Summary and description of information collections:* The Technical Standards establish a process for ensuring that Class II gaming systems have been reviewed and evaluated by a qualified, independent testing laboratory prior to their approval by a tribal gaming regulatory authority and their availability to the public for play. The process helps to ensure the proper functioning of the systems and the integrity, fairness, and auditability of games played.

The process requires a tribe's gaming regulatory authority to require that all

Class II gaming systems, or modifications thereto, be submitted to a qualified, independent testing laboratory for review and analysis. That submission includes a working prototype of the game and aid, all pertinent software, and complete documentation and descriptions of all functions and components. In turn, the laboratory will determine that the gaming system does or does not meet the requirements of the Technical Standards and any additional requirements adopted by the tribe's gaming regulatory authority. The laboratory will provide a written report of its analysis and conclusions to the tribal gaming regulatory authority, which in turn will approve or disapprove the system or modification. The tribal gaming regulatory authority will retain the laboratory report as long as the system or modification remains available to the public for play.

This process is necessary to ensure the security and integrity of Class II gaming. Technical standards generally are a fundamental part of Class III gaming and of non-Indian, commercial casino gaming throughout North America. No uniform standards exist for Class II gaming, however. The implementation of such standards will assist tribal gaming regulators in ensuring that games are implemented fairly, that all gaming systems are secure and function properly, and that the tribes and operators are able to properly account for gaming revenue.

The Technical Standards implement an analogous process for determining whether a Class II gaming system is eligible for the five-year grandfather period. This process again requires a tribe's gaming regulatory authority to require that a Class II gaming system be submitted, within 120 days after the effective date, to a qualified, independent testing laboratory for review and analysis. The submission must include a working prototype of the game and aid, all pertinent software, and complete documentation and descriptions of all functions and components. In turn, the laboratory will determine that the gaming system does or does not meet a small set of specified requirements. The laboratory will provide a written report of its analysis and conclusions to the tribal gaming regulatory authority, which in turn will determine that the gaming system is or is not eligible for grandfather status. Upon a finding of eligibility, the tribal gaming regulatory authority will issue a certificate to that effect to the gaming system manufacturer and a description of the grandfathered game to the Commission.

This process is necessary to ensure a certain minimum integrity and security for games while at the same time avoiding potentially significant economic and practical consequences of requiring immediate and complete compliance with the Technical Standards.

Finally, the Technical Standards establish a process for testing laboratories to establish their eligibility to provide testing services to the tribal gaming regulatory authorities. The testing laboratories must submit to suitability determinations made by the tribes they serve, and these determinations include criminal background checks for the laboratories' principals. These determinations are made according to the same standards used to license the primary management officials and key employees of Indian gaming operations under the Indian Gaming Regulatory Act. All of this requires the submission by the laboratory of corporate financial information; qualifications of the engineering staff; information (and inspections) of the available engineering facilities, and personal information for principals, including tax returns, bankruptcies and law suits, work histories, and references.

Given the essential role accorded to laboratories in ensuring the integrity, security, and auditability of Class II gaming systems, this process is essential to ensuring the competence, integrity, and independence of the testing laboratories and the suitability of their decision makers, *i.e.* to ensure that undesirable elements are kept out of gaming.

*Respondents:* The respondents are independent testing laboratories, developers and manufacturers of Class II gaming systems, and Indian tribes. The Commission estimates that there are currently 20 such manufacturers, 5 such laboratories, and 226 gaming tribes. The frequency of responses to the information collection requirement will vary.

*Information Collection Burden:* In order to qualify under the grandfather provisions of the Technical Standards, a gaming system must be submitted to a testing laboratory for review and analysis during the first 120 days after the effective date of the rule. The Commission estimates that there are approximately 25 Class II gaming systems in existence and that all will be submitted during this period.

Following the initial 120-day period, the frequency of submissions of new gaming systems or of modifications to

existing gaming systems will be entirely market driven. The Commission anticipates approximately a 20% turnover each year for the five-year grandfather period. Consequently, there should be approximately five submissions of new gaming systems each year.

Submissions of modifications are, as a matter of course, a more common practice. Software in particular commonly goes through many iterations in development and continues to be improved and revised even after sale and placement on a gaming operation's floor. That said, the submission of modifications tends to be sporadic, with less frequent or occasional submissions punctuated by fairly steady periods of submissions when new systems or modifications are introduced. The Commission anticipates there will be approximately 300 submissions of modifications and thus 300 reports produced by testing laboratories each year following the 120-day period that begins on the effective date of the rule.

The preparation and submission of supporting documentation by manufacturers or a tribal gaming operation (as opposed to gaming system hardware and software *per se*) is an information collection burden under the Paperwork Reduction Act, as is the preparation of reports by the testing laboratories or the preparation of a grandfather certificate and explanation of gaming system by a tribal gaming regulatory authority.

It is the existing practice in the gaming industry, both Indian and non-Indian alike, for the game manufacturer to submit a gaming system to a testing laboratory for review and analysis. The Technical Standards leave open the possibility that a tribal gaming regulatory authority may require the management of a gaming operation to make a required submission. The Commission anticipates, however, that it will be the responsibility of the gaming system manufacturers to make the submissions to testing laboratories.

The amount of documentation submitted by a manufacturer as part of a submission of a gaming system and the size of a laboratory report is a function of the complexity of the gaming system submitted for review. Submission for minor modifications to software or hardware already submitted and examined will be a matter of little time both for manufacturer and laboratory, while the submission and review of an entirely new game platform will be time consuming. The provision of a grandfather certificate and a

description of a gaming system's component are small matters as that information can be taken directly from a testing laboratory's report.

Accordingly, based upon the discussions with leading testing laboratories and with manufacturers for the Indian gaming and non-Indian gaming markets, the Commission estimates that gathering and preparing documentation for a submission of a single, complete gaming system will require, on average, 8 hours for a manufacturer's employee. The Commission estimates that following examination and analysis, writing a report for a complete gaming system will require, on average, 10 hours of a laboratory engineer's time. For the submission of modifications to a gaming system, the Commission estimates 4 hours for a manufacturer's employee. For the report on a modification, the Commission estimates 5 hours for a laboratory engineer.

Thus, the information collection requirements will be a 200-hour burden on manufacturers industry-wide during the first 120 days after the Technical Standards become effective and a 1,200-hour burden industry-wide thereafter. The information collection requirements will be a 250-hour burden on laboratories for the grandfather submissions made during the first 120 days and a 1,500-hour burden thereafter.

Next, the Commission anticipates that tribal gaming regulatory authorities will issue grandfather certificates to manufacturers and send a description of grandfathered systems to the Commission for all of the approximately 25 existing gaming systems. The preparation of these certificates and descriptions will be a small matter as all of the necessary information is contained in the testing laboratory reports and will take no more than 0.5 hours to prepare.

Finally, the Technical Standards require tribal gaming regulatory authorities to maintain laboratory reports as long as the game system or modification at issue is available for play. This, however, is a ministerial function that involves little more than filing, and occasionally retrieving, the report. As this is already common practice among tribal gaming regulatory authorities, the Commission estimates that 0.1 hours per report will be dedicated to these tasks.

The following table summarizes the annual hour burden:

Provision	Respondents	Number of respondents	Collections, 1st 120 days	Hours per collection	Total annual hours	Collections, day 121 forward, per annum	Hours per collection	Total annual hours
25 CFR 547.4 ...	Laboratories .....	5	25	10	250	300	5	1,500
25 CFR 547.4 ...	Manufacturers .....	20	25	8	200	300	4	1,200
25 CFR 547.4 ...	Tribal Gaming Operations.	226	0	0	0	0	0	0
25 CFR .....	Tribal Gaming Regulatory Authorities.	226	25	.5	12.5	300	0.1	30

The Technical Standards require a determination of suitability for each of the approximately 5 testing laboratories. The information required can be substantial: Corporate financial information; qualifications of the engineering staff; information (and inspections) of the engineering facilities available; and personal information for principals, including tax returns, bankruptcies and lawsuits, work histories, and references.

However, the 5 existing testing laboratories have already collected and provided this information—multiple times—in order to be licensed in tribal and non-tribal gaming jurisdictions nationwide. The Commission estimates that the re-submission of such information would take the necessary laboratory employees 20 hours to accomplish once. As the gaming tribes typically use only one gaming laboratory, the submission of suitability determinations to 226 tribal gaming regulatory authorities would total 4,520 hours.

The Commission believes, however, that the hour burden is not likely to be nearly this high. Rather than require each tribal gaming regulatory authority to make a new suitability determination for each testing laboratory it uses, the Technical Standards permit a tribal gaming regulatory authority to rely upon a suitability determination already made by another gaming jurisdiction in the United States. The existing testing laboratories are already licensed or approved in numerous jurisdictions throughout the United States, and the Commission believes that approximately 90%—203 of 226—of the tribal gaming authorities will accept existing suitability determinations from other jurisdictions or will already have made one under their own vendor licensing programs. The submission by a testing lab of an existing suitability determination amounts to the writing of a letter. The Commission estimates that the submission of such letters will take the necessary laboratory employees 0.5 hours to accomplish once. As each of

the gaming tribes typically uses only one gaming laboratory, the submission of suitability determinations to 203 tribal gaming authorities would total 101.5 hours. For the remaining 10% or 23 tribal gaming regulatory authorities, the submission burden on laboratories is 20 hours per tribe or 460 hours.

#### Review of Public Comments Concerning Information Collections

On February 19, 2008, the Office of Management and Budget (OMB) took action on the Commission's request for approval of the information collections in the Technical Standards and required the Commission to explain how it has "maximized the practical utility of the collection and minimized the burden." OMB required as well that the Commission respond to public comment on the information collections.

The Commission has maximized the utility of the information collections and minimized the burden on the industry by adopting industry-standard practices already required and in place across non-tribal gaming throughout North America and already common in tribal gaming. In this way, the Technical Standards require little that is new.

First and foremost, as stated above, the review of gaming systems by testing laboratories and their subsequent approval by tribal gaming regulatory authorities is essential to the integrity of Indian gaming. The process enables tribal gaming regulators to ensure that games are implemented fairly, that all gaming systems are secure and function properly, and that the tribes and operators are able to properly account for gaming revenue. This process and the information collections that it necessitates are already in place.

Independent testing laboratories owe their very existence to the widespread use of this practice. They are, in essence, in the business of testing and examining gaming equipment against a set of regulatory standards and then issuing a report of their findings. They are, thus, already set up to comply with the information collections required by

the Technical Standards. Likewise, gaming manufacturers are already in the business of submitting gaming equipment and software for laboratory review and are already set up to provide the information collections required here. What is more, many tribal gaming regulatory authorities already require manufacturers to submit gaming equipment and software to testing laboratories for review and already keep the resulting reports, just as a matter of sound regulatory practice. The Technical Standards merely make the requirement applicable nationwide.

The Technical Standards reduce the information collection burden on tribes, manufacturers, and testing laboratories by rules of common sense and non-repetition. There are 226 gaming tribes, and manufacturers, of course, seek to sell gaming systems to as many tribes as possible. The Technical Standards do not require that a gaming system be resubmitted to a testing laboratory for each tribal gaming operation. Once a testing laboratory has issued a report for a given gaming system or modification, every tribal gaming regulatory authority may rely upon it. Further, the information collection burden surrounding the submission, review, and approval of gaming equipment and software is eased still further in that the Technical Standards permit electronic means of providing, receiving, and storing information at the convenience of all parties concerned.

Second and finally, as stated above, the Technical Standards require testing laboratories to submit to suitability determinations by tribal gaming regulatory authorities. Again, assuring the competence, integrity, and independence of the testing laboratories and the suitability of their decision-makers is essential to the integrity of gaming. This information collection, though essential, has the potential to be burdensome. The Technical Standards reduce this burden as much as is practicable.

Again, the Technical Standards piggy-back on processes already established.

The existing testing laboratories have already collected and provided the necessary information—multiple times—in order to be approved in tribal and non-tribal gaming jurisdictions nationwide. Similarly, the Technical Standards reduce unnecessary duplication. Testing Laboratories need not submit 226 separate suitability applications. Tribal gaming regulatory authorities are free to accept any suitability determination made by any state or tribal regulatory authority in the United States. Finally, electronic submission, receipt, and maintenance of this information collection is permitted.

For all of these reasons, then, the Commission believes that the Technical Standards have maximized the practical utility of the information collections they require while at the same time minimizing the burden they place upon the industry.

#### *Paperwork Reduction Act Comments*

*Comment:* One commenter stated that the Commission did not properly figure the burden upon tribes of the information collection burdens imposed by the Technical Standards. The Commission's focus was on the burdens on gaming laboratories, which are not burdened at all since their services are compensated.

*Response:* The Commission disagrees. The Commission's cost estimates do, in fact, list the 226 tribal gaming operations and 226 tribal gaming regulatory authorities as respondents. The burden upon them is minimal, however. Though the tribal gaming regulatory authority or gaming operation may choose to submit a Class II gaming system to a testing laboratory for evaluation, the standard practice is to place that obligation on the manufacturers. They are the ones best situated to provide all necessary prototype hardware, software and documentation to the testing laboratories and to respond to testing laboratory concerns and inquiries. Indeed, manufacturers already have such systems set up for compliance with the regulatory requirements of commercial gaming jurisdictions. The emphasis on the information collection burdens is, therefore, properly on the manufacturers and the laboratories. The burden upon the tribes is minimal and involves retaining laboratory reports, a standard existing practice; identifying a finite number of grandfathered Class II gaming systems to the Commission; and suitability determinations of laboratory principals.

*Comment:* A few commenters stated that because the Technical Standards will take effect "all at once," the

Commission underestimates the turnover rate of gaming systems and the associated paperwork burdens.

*Response:* The Commission disagrees. The Technical Standards provide for a five-year grandfather period in which existing Class II gaming systems may be brought into compliance. The Commission believes that existing Class II systems will be brought closer to or into compliance due to regular upgrades, and the Technical Standards specifically allow for this possibility. 547.4(b)(4). The Commission further believes that many new, compliant systems will be brought to market over this period, as they have during other five-year periods. Neither market condition suggests an immediate turnover of existing gaming systems or that the Commission underestimated the paperwork burden associated with turnover.

*Comment:* A few commenters stated that the Commission has failed to take any steps to minimize information collection burdens by providing for the use of automated information collection, maintenance or submission techniques.

*Response:* The Commission disagrees. There is no limitation in the Technical Standards on the technology usable for information collections. Paperless submission, maintenance, and collection of information is perfectly acceptable.

*Comment:* One commenter stated that the Commission underestimates the time it will take the testing laboratories to test Class II gaming systems for grandfather compliance, depending on whether the software random number generator has already been approved. The commenter therefore recommends revising upward the hours burden on the testing laboratories.

*Response:* Whether or not the Commission underestimated the time laboratory testing may take, this is not an information burden placed upon the testing laboratories. The information burden refers to the time it will take the testing laboratory to write the reports of their findings and results. That time does not change, even if the time for testing does.

#### **National Environmental Policy Act**

The Commission has determined that the Technical Standards do not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

#### *Review of Public Comments*

A number of commenters made miscellaneous editorial suggestions not intended to change the substance of the Technical Regulations but to improve sentence structure, correct grammar, preserve consistency of usage throughout the document, etc.

*Response:* The Commission has accepted all such changes where they improve clarity and editorial consistency, and these are reflected throughout the final rule. Substantive changes are addressed in the responses to comments below.

#### **General Comments**

*Comment:* A number of commenters objected to the adoption of the Technical Standards and request their withdrawal unless the Commission accept, without alteration, the draft of the Technical Standards provided to it by its tribal advisory committee. Based upon these differences, and the inability of the Commission to come to consensus with the advisory committee about them, others commenters asked that the Commission not proceed with the Technical Standards but return to the advisory committee for further drafting and for consultation with tribes.

*Response:* As said above, the Commission greatly values and appreciates the work on the technical standards done by the tribal advisory committee and the working group of tribal leaders, tribal regulators, and manufacturers who advised them. During drafting, the Commission did state to the Committee members that their role was advisory and that the Commission could, as the final decision-maker, choose to depart from the draft provided. The Commission believes that this was appropriate insofar as this is consistent with its federal regulatory oversight mission. Nonetheless, most of what the Commission proposed as part 547 was taken verbatim from the draft that the advisory committee supplied.

There were, of course, some departures from the advisory committee's draft, and the one that has received the most comments—all in opposition—is the requirement that compliance with the Technical Standards also requires compliance with the proposed part 546, classification standards. As the Commission has withdrawn the proposed classification standards (see notice of withdrawal published simultaneously), the Commission has removed all references to them.

Nonetheless, the rule still departs from the recommended draft in a few

ways. The rule still requires a certain minimum probability, the recall of entertaining displays, and hardware compliance. As explained in detail below, the Commission believes that these requirements are appropriate. That said, in order to stay abreast of advances in technology, the Commission intends to regularly revisit its technical standards, and in doing so it will pay particular attention to these provisions that have caused such disagreement. In so doing, the Commission intends to consult further.

Other departures from the advisory committee draft have been raised as comments, and the Commission's responses to those comments are also set out below.

*Comment:* Several comments stated that the comment period was not long enough.

*Response:* In the October 24, 2007 notice of proposed rulemaking, the Commission initially provided that the comment period would end on December 10, 2007, a period of 47 days. Because early comments requested additional time, the Commission extended the comment period until March 9, 2008, creating a total comment period of 138 days (including the date of publication). The Commission believes that this period was more than sufficient, given the extensive and thoughtful comments it received and that have informed this final rule.

*Comment:* A number of commenters faulted the Commission's consultation with tribes about the Technical Standards. Some stated that the Commission's use of advisory committees was not a substitute for consultation. Others stated that the Commission did not consult, or consult sufficiently, on the Technical Standards, particularly after the advisory committee provided its final draft to the Commission.

*Response:* The Commission stands by its record on consultation. The Commission does not believe that its use of the advisory committee was a substitute for consultation, and it has set out the details of its consultations above.

As to the quality of consultation, some commenters fault the Commission for not allotting sufficient time for individual consultation sessions. The Commission understands and appreciates this concern. The Commission would point out, however, that it goes to great time and expense traveling to large regional and national gaming association meetings to make itself available for consultations, and this minimizes the burdens of time and expense for the tribes. The Commission

would point out as well that with approximately 225 tribes engaged in gaming, balancing the time spent in consultations on the one hand with the Commission's other duties and obligations on the other is difficult. Further, the Commission believes that the criticism concerning the quality of consultation about the technical standards, however, is an unfair one, when only 25% of the tribes accepted invitations for consultation between September 2005 and December 2007 and only a minority of those that accepted actually chose to discuss the Technical Standards.

That said, the Commission recognizes that there are many views about what consultation is and how it may best be done. The Commission is not married to its consultation practices and has already begun a dialogue and collaboration with tribal leaders, through the National Congress of American Indians and the National Indian Gaming Association, about finding mutually satisfactory methods of consultation.

Finally, the Commission would note that its extensive consultation was successful and resulted in significant changes to the Technical Standards—all for the better, the Commission believes. Most prominent among these was the Commission's decision to abandon its first proposed technical standards to begin the process of drafting technical standards over again from the beginning.

*Comment:* A number of commenters suggested that the Technical Standards will, alone or in combination with the proposed Classification standards and MICS, have a devastating economic effect on Class II gaming, as demonstrated by the Commission's own economic impact study. These and other commenters felt that study is itself flawed, as it both improperly calculates some economic effects and ignores others, such as local effects and costs. In addition to the obvious direct economic consequences, a few commenters also saw a loss of negotiating power in future dealings with the states.

*Response:* The Commission disagrees. The Commission does not see an economic collapse of Class II gaming as a result of the Technical Standards. There is no support for that proposition. While the economic impact study of Dr. Alan Meister of the Analysis Group does find that there will be costs to comply with the Technical Standards, the vast majority of the economic impact from the set of four regulations proposed in October 24, 2007, stems from the projected revenue loss and the compliance costs associated with the

now-discarded classification standards. This is so, even assuming the calculation and under-counting criticisms of the study are in fact correct.

Further, the Commission's cost-benefit analysis finds that the Technical Standards, considered independently, are not a major rule. They impose an annual cost of approximately \$3 million—hardly an onerous cost when compared to the \$25 billion in gross gaming revenue the industry earned in 2007. Taken together with the proposed Class II MICS, the annual costs are not much higher. Adoption of the Technical Standards, therefore, alone or with the MICS, will not imperil the viability of Class II gaming and will not impair the tribes' negotiating power in dealings with the states.

*Comment:* One commenter felt that the Technical Standards will not work because they are built upon the mistaken assumption that Class II gaming is based upon gaming components.

*Response:* The Commission disagrees. The Technical Standards do not assume that Class II gaming is based upon components. Central to the Technical Standards is the idea of the Class II gaming system, which allows the Technical Standards to address all of the various ways that Class II games can be played. The notion of the "gaming system," for example, encompasses bingo whether it is played electronically on client-server architectures, with ping pong balls drawn from a hopper and cards marked by an electronic minder purchased at a point-of-sale retail station, or with some other system. Necessarily, then, the definition of system makes reference to "components," for it is the unique collection of components that makes up a gaming system. It is, however, the system, and not individual components, that must comply with the requirements of the Technical Standards.

*Comment:* A number of commenters suggested that the Commission's rule-making process was itself flawed, over and above any consideration of economic effect the Technical Standards might have. Some commenters felt that the Commission is not an independent regulatory agency and, as such, it has failed to comply with the requirements of Executive Orders 12875, 12866, and 13175 and the Unfunded Mandates Reform Act, 2 U.S.C. 658(1); 1502(1). A few felt that the Commission has failed to comply with the Federal Advisory Committees Act (FACA) or the Government Performance and Results Act (GPRA). Others felt that the Commission should not have published

the proposed rules before the economic impact study was ready and should have considered other regulatory alternatives. Others still find that the regulations, if made final, would result in a regulatory taking, contrary to the Commission's finding in the proposed rule.

*Response:* The Commission disagrees. Congress has made abundantly clear that it intended the Commission to be an independent regulatory agency and, as such, exempt from the requirements of these Executive Orders and the Unfunded Mandates Reform Act. The Senate report accompanying the passage of IGRA provides Congress's intention clearly and unambiguously: The bill "established a National Indian Gaming Commission as an independent agency within the Department of Interior." S. Rep. No. 100-446, at 1 (1988). When it amended IGRA in 2005, Congress reiterated its intention:

Additionally, it is to be noted that the NIGC is an independent regulatory agency. This status has ramifications, including, that the agency is not governed by Executive Order 13175, which compels agencies other than independent regulatory agencies to consult tribal officials in the development of regulatory policies that have tribal implications. The Executive Order encourages independent agencies to observe its precepts, however, and the Committee notes with approval that the Commission, through its current consultation policy, has endeavored to do so. S. Rep. No. 109-122 at 3 (2005).

As to the publication of the economic analysis after publication of the rule, that, while not ideal, did not deprive the industry or the interested public of the benefit of the report, as the careful comments submitted about its methodological failings make clear. Likewise, the Commission has considered regulatory alternatives, not the least of which is its withdrawal of the proposed Classification standards.

As to compliance with FACA, the Commission's advisory committees are exempt from the requirements of FACA because the non-Commission members were elected officials of tribal governments, or their authorized designees, acting in their official capacities. 41 CFR 102-3.40(g).

As to compliance with GPRA, the Commission agrees that Public Law 109-221, the Native American Technical Corrections Act of 2006, provides that the NIGC shall be subject to the GPRA. On September 30, 2007, the NIGC submitted a draft performance and accountability report with the Office of Management and Budget for review. The Commission is currently making revisions to its GPRA plan.

Further, on September 18, 2008, the Commission released a draft five-year strategic plan to tribes, tribal trade associations, and Congress for comments. The strategic plan, like the performance plan, is required by GPRA.

Finally, the comment about regulatory taking is premised upon the wholesale disappearance of the Class II gaming industry as a result of adoption of the Technical Standards. As the Commission said above, with the relatively small cost of the Technical Standards alone, or together with the MICS, there will be no complete destruction of Class II gaming. There will be no complete loss of the economically beneficial or productive use of tribes' Class II investments and, by definition, no regulatory taking. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

*Comment:* A few commenters suggested that the Commission lacks the statutory authority to promulgate the Technical Standards, one analogizing the situation to that in *Colorado Indian Tribes v. NIGC*, 466 F.3d 134 (DC Cir. 2006) (*CRIT*), where the DC Circuit ultimately found that the Commission lacked the authority to promulgate and enforce Class III minimum internal control standards.

*Response:* The Commission disagrees. IGRA does give the Commission the authority to adopt the Technical Standards. Congress was expressly concerned that gaming under IGRA be "conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). The Technical Standards are specifically designed to protect the integrity, fairness and safety of Class II gaming. Adopting the Technical Standards is consistent with the authority granted the Commission to monitor, inspect, and examine Class II gaming, 25 U.S.C. 2706 (b)(1)-(4), and to promulgate such regulations as it deems appropriate to implement the provisions of IGRA. 25 U.S.C. 2706(b)(10). The Commission disagrees with the commenter who drew the opposite conclusion.

The Commission likewise believes that this reading distinguishes this circumstance from the *CRIT* case. There, the Court found that 2706(b)(10) could not be a source of authority for Class III MICS because there are no applicable provisions in IGRA concerning day-to-day Class III regulatory authority that the Commission could implement through rulemaking. Here, by contrast, the Commission is implementing its monitoring, inspecting, and examining authority over Class II gaming, specifically granted by IGRA in 25 U.S.C. 2706(b).

In particular, the Technical Standards make meaningful the Commission's monitoring, inspection, and examination authority. As stated above, the Technical Standards do not, and are not designed to, prescribe the design or features of Class II gaming systems. To the contrary, the Technical Standards set out various minimum ways that gaming systems can meet IGRA's goal of ensuring that gaming is conducted fairly and honestly, both by operators and by the public, 25 U.S.C. 2702(2), leaving specific implementations designed to meet those regulatory goals to the tribal gaming regulatory authorities and industry.

For example, the Technical Standards require components that store financial instruments and that are not operated under the control of a gaming operation employee "shall be located within a secure and locked area or in a locked cabinet or housing that is of a robust construction designed to resist determined illegal entry and to protect internal components." How exactly "robust construction" is to be implemented, the Technical Standards do not say, but the purpose of the standard is clear—assets held in gaming equipment are to be secure from theft and tampering.

Similarly, the Technical Standards require that progressive awards on Class II gaming systems have a minimum chance of being hit of 1 in 100,000,000. What precisely the chances of hitting the award are or should be, the Technical Standards do not say, leaving the matter instead to the tribal gaming regulatory authorities and the market. As stated below, the purpose of the minimum probability requirement is to ensure fairness in the play of Class II games by eliminating advertised awards that will never be hit because the chances of doing so are astronomically low.

Before a Class II gaming system may be placed on the floor and offered to the public for play, it must be submitted to an independent gaming laboratory, which will test the system for compliance with the Technical Standards. The testing laboratory will then submit a report of its findings to the tribal gaming regulatory authority, which in turn will approve the system for play (or not). The tribal gaming regulatory authority will keep the testing laboratory's report and a record of its approval.

It is this, then, that enables the Commission, through its monitoring, inspection and examination authority to ensure the security of Class II gaming systems and assets, to ensure the fairness of Class II games, and to ensure that tribes are the primary beneficiaries

of their gaming. 25 U.S.C. 2702(2). The Commission achieves these regulatory goals by monitoring, inspecting, and examining the gaming systems and the documentation of its compliance with the Technical Standards. Given all of this, the Commission disagrees with the commenter who concluded that it lacks the authority to promulgate the Technical Standards.

*Comment:* A few commenters objected to the Technical Standards as encroaching too far into the primary authority and responsibility tribes have to regulate Class II gaming and overstepping the Commission's oversight regulatory role.

*Response:* The Commission is keenly aware that the primary responsibility for regulating Class II gaming belongs to the tribes and has no desire to intrude upon it. The Commission is also aware of the substantial sums tribes spend upon regulation and the excellent job they do. The Commission does not believe that the Technical Standards improperly intrude upon the tribes' role as primary regulators. Rather, the Technical Standards have been drafted and redrafted to ensure that the tribes remain the primary regulators.

The Technical Standards are designed to be minimum standards. They give the tribal gaming regulatory authorities the primary role in approving Class II gaming systems and modifications thereto. Indeed, the Commission plays no direct role under the Technical Standards save when a tribal gaming regulatory authority seeks a variance. Further, the Technical Standards specifically contemplate the primacy of the tribal gaming regulatory authorities insofar as they may, in their discretion, supplement the Technical Standards by adopting additional standards or standards more stringent than the minimum standards. § 547.5(a). The Commission therefore disagrees with the commenter who characterized the Technical Standards as directing a specific course of action and eliminating alternatives.

The Commission also disagrees, as one commenter states, that 25 U.S.C. 2701(5) demonstrates that the Commission has improperly encroached upon the tribes' authority: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." This Congressional finding does not mean that tribes may regulate Class II gaming to the exclusion of the Commission. Rather, this paragraph is

merely a restatement of the holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). From that fundamental starting point, the regulatory structure established by IGRA, including the Commission's role in the regulation of Class II gaming, was built.

*Comment:* One commenter stated that the Technical Standards do not recognize the regulatory authority and capability of tribes that have earned a Class II self-regulation certificate.

*Response:* The Commission agrees that the Technical Standards do not explicitly refer to self-regulating tribes, but there is no intent to slight or to diminish the regulatory authority and capabilities of self-regulating tribes, which are evident to all by the fact of their self-regulation.

As stated above, the Technical Standards are not intended to encroach on the regulatory authority of any tribal gaming regulatory authority. The Technical Standards adopt minimum standards and already-existing best practices such as the testing of gaming equipment by testing laboratories. As such, they should impose only the most minimal new burdens on the self-regulating tribe.

The most obvious is the procedure surrounding the testing and certification of grandfathered gaming systems. That, however, is matter of national uniformity. It allows the Commission both to ensure that all grandfathered, non-compliant Class II gaming systems across the nation meet certain minimal standards and to identify and track all of them.

Though self-regulating tribes do have to follow Commission regulations, 25 CFR 518.4(a)(4), the Technical Standards do not change the applicability of IGRA's self-regulation provisions. Self-regulating tribes are still exempt from certain of the Commission's powers as delimited in 25 U.S.C. 2710(c)(5).

*Comment:* One commenter suggested that the adoption of the Technical Standards is arbitrary and capricious primarily because the Technical Standards do not fix an identifiable problem or fill a regulatory void, because their onerous compliance obligations bear no reasonable relationship to the regulatory benefit that they will provide, and because the Commission has provided no rational basis for the standards.

*Response:* The Commission disagrees. As a matter of regulatory best practices, all commercial gaming jurisdictions and many, if not most, tribal gaming jurisdictions require the testing of gaming equipment against technical

standards and the subsequent approval of the relevant governmental authority. The Technical Standards are designed to uniformly implement a minimum set of these best practices across Indian gaming. That they are not so implemented now, and in some places technical standards are not implemented at all, is justification enough for their need. All of Indian gaming benefits when the nationwide gaming public may be assured of the integrity and fairness of Class II gaming, no matter where implemented. Accordingly, the Commission also disagrees with the commenters who suggested that the Technical Standards be issued not as regulations but as a non-binding bulletin.

The Commission disagrees that this regulatory benefit is outweighed by onerous compliance obligations. To the contrary, the Commission believes that compliance with the Technical Standards is not onerous, financially or otherwise. While the economic impact study of Dr. Alan Meister of the Analysis Group does find that there will be costs to comply with the Technical Standards, the vast majority of the economic impact from the set of four regulations proposed in October 24, 2007, stems from the projected revenue loss and the compliance costs associated with the now-discarded classification standards. Again, the Commission's cost-benefit analysis finds that the Technical Standards, considered independently, are not a major rule. They impose an annual cost of approximately \$3 million—hardly an onerous cost when compared to the \$25 billion in gross gaming revenue the industry earned in 2007.

Further, the general rule expressed in the Technical Standards is that laboratory review and tribal gaming regulatory authority approval is required before a Class II gaming system may be offered to the public for play. In establishing this procedure, the Technical Standards merely formalize the best practices that already exist both in tribal and non-tribal gaming jurisdictions alike. As such, the Commission does not believe that the testing procedure is onerous.

*Comment:* One commenter stated that the Technical Standards will have a chilling effect upon Class II technology, limiting use to today's technology and inhibiting or prohibiting its development and advancement. IGRA, by contrast, states that the tribes are to have maximum flexibility in the use of technology.

*Response:* The Commission disagrees. The Commission discarded the draft proposed technical standards published

in August 2006 for precisely this reason. The current proposed part 547 was therefore specifically designed not to prescribe how equipment is to be built but to state the desired regulatory outcome, leaving it to the ingenuity of the industry to figure out compliant designs, whatever form the new technology may take.

*Comment:* One commenter stated that the Technical Standards are improperly retroactive because the Commission lacks the authority under IGRA to promulgate retroactive regulations.

*Response:* The Commission disagrees that the Technical Standards are retroactive. The Technical standards apply prospectively only and do not alter the legal consequences of actions completed before their effective date. The Technical Standards, in other words, attach no liability to any operation of any non-compliant Class II gaming systems that occurred prior to their effective date. Indeed, given the grandfather provisions in § 547.4, they attach no liability to the operation of non-compliant systems for five years after the effective date either. As such, the Commission disagrees with the commenters who characterized the grandfather provisions as unreasonable.

That said, the Technical standards can without question upset settled expectations based upon prior law and impose economic burdens on past conduct. Some tribes will have invested in Class II gaming systems that will have to be modified or replaced during the five-year grandfather period. This unsettling of expectations and the imposition of unexpected economic burdens in this way, however, does not make the Technical Standards retroactive. *See Landgraf v. USI Film Products*, 511 U.S. 244, 269 n. 24 (1994) (“Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: \* \* \* a new law banning gambling harms the person who had begun to construct a casino before the law’s enactment \* \* \*.”)

#### Comments Upon § 547.3, Definitions

*Comment:* One commenter suggested that the definitions in the Technical Standards should conform to the definitions in the companion MICS, § 543.2, unless there is an appropriate reason for different terms.

*Response:* The Commission agrees and, where possible, the Commission has used terms consistently in the two rules. It was, however, not always possible to do so as the two rules have different objectives. The Technical Standards are intended to define the technical specifications of Class II

gaming systems, while the companion MICS are intended to set minimum standards, consistent with industry best practices, for the authorization, recognition, and recordation of gaming and gaming-related transactions. Consequently, users should be well aware of the definition section accompanying each rule.

*Comment:* A number of commenters suggested broadening the definition of “agent” to include any person authorized by the gaming operation and the tribal gaming regulatory authority to undertake specified decisions, actions, or tasks, whether or not they are employees of the operation or licensed by the tribal gaming regulatory authority.

*Response:* As the Commission understands the comment, the definition of “agent” is too restrictive and places unnecessary regulatory obstacles in the way of routine activities by requiring licensure when that is not always necessary. The Commission agrees.

The Technical Standards use the term “agent” when prescribing security standards for financial instrument storage components, financial instrument acceptors, financial instrument dispensers, and components that determine game outcome. One standard applies when such components are operated under the direct control of an agent—e.g., a cash drawer—and another applies when such components are operated automatically, independently of such control—e.g., a bill acceptor. These individuals may or may not be key employees, and therefore IGRA may or may not require their licensure. Accordingly, the Commission believes that when such individuals are key employees they must be licensed, and when they are not key employees, their licensure is a matter left to the tribal gaming regulatory authorities.

The Commission has edited the definition of “agent” in conformance with the comment to read, “An employee or other person authorized by the gaming operation, as approved by the tribal gaming regulatory authority, designated for certain decisions, tasks and actions in the gaming operation.”

*Comment:* One commenter suggested changing the proposed definitions of “agent” and “employee” to create a distinction between the two and using “employee or agent” throughout part 547, where the proposed text says only “agent.” An “employee” would mean an employee of a gaming operation licensed by the tribal gaming regulatory authority, and an “agent” would be a non-employee “authorized by a gaming

operation to make decisions for, or perform tasks or action on behalf of, the gaming operation.”

*Response:* See response to previous comment.

*Comment:* A number of commenters suggested restoring a definition of “promotional account” to mean “a file, record or other data structure that records transactions involving a patron or patrons that are not otherwise recorded in a patron deposit account.” That definition was included in the draft provided to the Commission by its tribal advisory committee. Similarly, these commenters suggest restoring the reference to “promotional account” to the definition of “cashless transaction” that the tribal advisory committee had provided.

*Response:* The Commission disagrees. The Commission removed the term “promotional account” from the Technical Standards’ definitions because the term appears nowhere else in the text. Therefore the definition of the term is unnecessary.

*Comment:* One commenter suggested for editorial consistency a change to the definition of Random Number Generator from that which produces “outputs that are effectively random” to one that produces “outputs that comply with the provisions of section 547.14.”

*Response:* The Commission believes that the proposed definition is sufficiently clear and that adopting the suggested comment would create a peculiar and undesirable result: A random number generator that did not comply with the requirements of § 547.14 would, by definition, not be a random number generator at all, as opposed to merely a non-compliant one.

#### Comments Upon § 547.4, Compliance

##### Section Title

*Comment:* One commenter suggested that the title of this section should be changed from “How do I comply with this part” to “How does a tribal government, tribal gaming regulatory authority, or tribal gaming operation comply with this part?” These entities, rather than unspecified individuals, are the parties required to comply.

*Response:* The Commission agrees and has adopted the change as suggested.

##### Section 547.4(a)(1)—Limited Immediate Compliance

*Comment:* One commenter suggested edits that would specifically require the supplier or manufacturer to submit the Class II gaming system software to a testing laboratory for verification.

*Response:* The Commission disagrees. The Commission recognizes that the

standard practice is for the manufacturer or supplier to make laboratory submissions, and nothing in the Technical Standards prohibits that. The Commission did not specify that it be the manufacturer or supplier who makes the submission so that the tribal gaming regulatory authority could choose whether this obligation should fall on the manufacturer or supplier, the gaming operation, or the tribal gaming regulatory authority itself.

*Comment:* One commenter suggested that the submission be accompanied by "any hardware, documentation or other information necessary to test such software."

*Response:* The Commission disagrees as the edit is unnecessary. Rather than attempt to specify everything that must be submitted, and perhaps omit something that might be necessary in individual or unusual cases, the Technical Standards attempt to leave what is required for testing to the testing laboratories themselves.

*Section 547.4(a)(2)—Limited Immediate Compliance*

*Comment:* One commenter suggested that this paragraph setting out the requirement of limited immediate compliance appears to have omitted mention of § 547.8(f), the requirement that there be some means of software signature verification for game software. It is included and required elsewhere in the section, e.g., in the requirements of the report that the testing laboratory must issue in § 547.4(a)(4).

*Response:* The Commission agrees and has corrected the omission.

*Section 547.4(a)(4)—Limited Immediate Compliance*

*Comment:* One commenter suggested that the section does not, but should, address what happens when the gaming laboratory does not issue its report within 120 days after the effective date of part 547.

*Response:* The comment makes clear that the section does not read in the way the Commission intended. The Commission did not intend to confine the entire limited immediate compliance process to the first 120 days after the effective date. Rather, it intended to allow grandfathered systems to be certified as such no matter how long the lab process took, provided that the submission was made within the first 120 days after the effective date of part 547. The Commission has changed the wording in this paragraph to make this clear. It has removed the 120-day requirement language from 547.4(a) and placed it within 547.4(a)(1), thus making the time limit applicable only to

the submission of the gaming system to the lab. Paragraph 547.4(a)(1) now reads: "\* \* \* Require that all Class II gaming system software that affects the play of the Class II game be submitted, together with the signature verification required by § 547.8(f), to a testing laboratory recognized pursuant to paragraph (f) of this section, within 120 days after the effective date of this part; \* \* \*

That said, however, it is in the interest of gaming operations for the testing laboratory to complete its evaluation and for the tribal gaming regulatory authority to issue its grandfather certifications as quickly as possible. Section 547.4(b) requires both of those things to occur before a Class II gaming system is grandfathered and available for play under the Technical Standards.

*Comment:* One commenter suggested that the submission process is unworkable in the circumstance where a tribe no longer has a relationship with the manufacturer(s) of its gaming systems.

*Response:* The Commission disagrees. As stated above, there is no requirement that the manufacturer make the submission to the testing laboratory for grandfather review. The tribal gaming regulatory authority may require the operation to do so. In the alternative, if one tribe requires a manufacturer to submit a system to a lab, another tribe running that same gaming system may rely on the same laboratory report.

*Comment:* One commenter suggested that the language of this paragraph be clarified to provide the tribal gaming regulatory authority 120 days to issue a certificate of grandfather status after receiving the testing laboratory's report.

*Response:* Given the comment and resulting change above, the Commission believes that this change is unnecessary. The tribal gaming regulatory authority will issue a certificate of grandfather status as it deems appropriate.

*Comment:* One commenter suggested that as drafted, § 547(a)(4) does not make sufficiently clear that "the testing laboratory only certifies that the submitted game software complies with the specified standards," while the tribal gaming regulatory authority certifies that the Class II gaming system is eligible for grandfather status.

*Response:* The Commission disagrees. As an initial matter, the testing laboratory is not required to "certify" that game software meet any standards. Rather, it is required only to issue a report as to its findings. Beyond that, the Commission believes that the this paragraph, as proposed, makes the respective responsibilities of the testing

laboratory and the tribal gaming regulatory authority clear. The Commission has, however, made a few minor editorial changes to ensure that clarity.

*Section 547.4(b)(2) and Elsewhere, Compliance With Classification Standards*

*Comment:* For many and varied reasons, many commenters objected to requiring compliance with the Commission's proposed Classification regulations, proposed 25 CFR part 546, 72 FR 60483 (Oct. 24, 2007), as part of the Technical Standards. These commenters asked, therefore, that all such cross-references and cross-compliance requirements be deleted.

*Response:* As the Commission has withdrawn the proposed classification standards (see notice of withdrawal published simultaneously), the Commission has removed all references to them.

*Section 547.4(b)(4) and Elsewhere, Compliance With Class II MICS*

*Comment:* Many commenters objected to requiring compliance with the Commission's Class II Minimum Internal Control Standards as part of the Technical Standards, pointing out that the two sets of rules serve different purposes. Technical Standards contain, in essence, design standards to which laboratories can test before a gaming system goes into operation, while MICS contain operational standards that apply after gaming systems go into operation. Further, testable design standards should be placed in the Technical Standards, while operational standards belong in the Class II MICS and cross-references should be removed.

*Response:* For the most part, the Commission agrees. However, the line between the two kinds of regulation is not impermeable. There are times when the means for complying with a particular internal control standard is built into a component of the Class II gaming system and can be tested by the testing laboratory. In those cases, a cross reference from one set of regulations to the other is appropriate. Such cross references therefore appear in § 547.4(c), testing and approval of Class II gaming systems generally, and § 547.4(d), emergency hardware and software changes, and require compliance with any testable standards in the MICS.

Further, §§ 547.5(b)(4)(i), (ii), and (iii)(B) all contain references to the Class II MICS. These paragraphs state that among the permissible modifications of grandfathered Class II gaming systems are those that advance the system's overall compliance not only with the

Technical Standards but also with the MICS. These cross-references, insofar as they both advance regulatory compliance and maintain the economic viability of grandfathered gaming systems, will remain.

*Section 547.4(b)—Grandfather Provisions*

*Comment:* One commenter suggested rewriting this paragraph to make clear that a Class II gaming system can qualify for grandfather status if it was placed in a tribal gaming facility by the effective date of the Technical Standards or was manufactured by that date.

*Response:* The Commission believes that the commenter has correctly stated the intent of § 547.4(b) and that the language of the proposed rule already stated this clearly.

*Section 547.4(b), (c)(3)—Grandfather Clause, Duration*

*Comment:* A number of commenters suggested making player interfaces permanently exempt from the requirements of the Technical Standards. One commenter suggested that all existing Class II gaming technology be permanently exempt from the Technical Standards. To do otherwise, the commenters suggested, will have significant negative financial consequences for Indian gaming. Others, similarly, suggested that the grandfather period was too short because five years is not the proper measure of the useful life of a Class II gaming system. A few others suggested that the grandfather period was inadequate because there are no compliant systems on the market today.

*Response:* The Commission does not agree that perpetually exempting player interfaces or all existing Class II technology from the Technical Standards is appropriate or that the five-year term is insufficient. While Dr. Meister's economic impact report does find that there will be costs to comply with the Technical Standards, the vast majority of the economic impact stems from the projected revenue loss and the compliance costs associated with the now-discarded classification standards. Again, the cost to the industry of complying with the Technical Standards is approximately \$3 million annually.

Further, there is a good regulatory reason for grandfathering existing hardware for only five years. By definition, grandfathered hardware is not compliant with all of the requirements of the technical standards. Perpetually grandfathering existing hardware will create a permanent class of non-compliant equipment. That is not

consistent with the regulatory purpose of the technical standards, namely to ensure the integrity and security of Class II gaming systems and the accountability of Class II gaming revenue. What is more, the Commission believes that market forces will move equipment toward greater compliance and that if most current systems are not compliant, they are not far from compliant either. Thus, the Technical Standards specifically provide that tribal gaming regulatory authorities, in their discretion, may require or permit changes to grandfathered equipment that will bring the equipment into better (if still incomplete) compliance, or even complete compliance. 547.4(b)(4)(ii). Finally, as most systems in play today were put into play long before the effective date of the Technical Standards, they will have a useful life longer than five years, even if they are removed from play at the end of the grandfather period.

*Section 547.4(d)—Emergency Hardware and Software Changes*

*Comment:* One commenter suggested that the use of the term "game software" in this paragraph is unnecessarily limiting. The section contemplates emergency changes necessary to correct problems "affecting the fairness, security, or integrity of a game or accounting system or any cashless system, or voucher system." However, the paragraph then only contemplates modified "game software," which by definition excludes software for cashless systems or voucher systems. The commenter recommends changing "game software" to "software" to accommodate emergency changes to these systems as well.

*Response:* The Commission agrees and has made the suggested change.

*§ 547.4(d)(2)(ii)—Emergency Hardware or Software Changes, Subsequent Submission to Testing Laboratory*

*Comment:* A number of commenters suggested changing the procedures applicable to emergency hardware of software changes to eliminate submission to a testing laboratory when the modifications would not affect the outcome of the game.

*Response:* The Commission disagrees. The Technical Standards are an attempt to provide a regulatory means for assuring the integrity and security of Class II gaming. These ends are best met when all Class II gaming hardware and software, and all modifications to gaming hardware and software, are verified by an independent testing laboratory and subject to the supervision of a tribal gaming regulatory

authority. Providing an exception to this verification and supervision does not serve this end. All modifications should be reviewed so that the integrity and security of Class II gaming systems are not inadvertently compromised.

*Section 547.4(f)—Testing Laboratories, Generally*

*Comment:* One commenter suggested that it should be the Commission, rather than the tribal gaming regulatory authorities, that selects the testing laboratories used for testing under the Technical Standards. Doing so, the commenter reasons, would ensure the independence of the laboratories.

*Response:* The Commission disagrees. The tribes have the primary responsibility for regulating gaming under IGRA, and the Technical Standards attempt to acknowledge this and place primary regulatory responsibility with tribal gaming regulatory authorities where it belongs. For example, part 547 provides minimum standards that tribal gaming regulatory authorities may supplement to suit their individual needs and standards; it places the responsibility for approving grandfathered gaming systems, and changes to those systems, with them; it places primary authority for approval of variances with them. As the tribal gaming regulatory authorities are already responsible under IGRA for licensing employees and management officials, and many are responsible under tribal law for licensing vendors, it is appropriate that they approve the use of testing laboratories as well. The Commission believes that the independence of the testing laboratories is assured by the limitation in § 547.4(f)(1)(iii), which states that a testing laboratory owned by a tribe may not test games or gaming equipment for that tribe's gaming operations.

*Comment:* A number of commenters objected to the role assigned to the independent testing laboratories by the Technical Standards. Some described the laboratories as "unaccountable third parties;" others described the verification process as "outsourcing" tribal sovereignty or letting the testing laboratories interpret IGRA and expressed concern about the process's complexity and cost.

*Response:* The Commission disagrees. The general rule is that laboratory review and tribal gaming regulatory authority approval is required before a Class II gaming system may be offered to the public for play. In establishing this procedure, the Technical Standards merely formalize the best practices that already exist both in tribal and non-tribal gaming jurisdictions alike. As

such, the Commission does not believe that the testing procedure is either overly complex or overly expensive.

Further, the testing laboratories are hardly unaccountable. The Technical Standards require the tribal gaming regulatory authorities to make suitability determinations for the principals of testing laboratories that they use, and the tribal gaming regulatory authorities may require that the laboratories be subject to whatever vendor licensing standards they feel appropriate. Further, the role of the testing laboratory is confined to providing an independent analysis of a particular gaming system's or modification's compliance with the technical standards. All questions of approval over gaming systems, grandfathering, changes to gaming systems, etc., belong not to the testing laboratory or the Commission but to the tribal gaming regulatory authority. As such, the Commission does not agree that there is an outsourcing of sovereignty.

*Section 547.4(f)(1)(iii)—Testing Laboratories, Ownership*

*Comment:* A number of commenters strongly objected to a perceived discriminatory prohibition in the Technical Standards that would prohibit tribal ownership of a testing laboratory. Tribal governments, like state governments, should be allowed to own and operate testing laboratories.

*Response:* The Commission agrees. Of course tribes can own and operate testing laboratories. There is not, and there has never been, any intent to make a blanket prohibition on tribal ownership or operation of testing laboratories. The Commission has reworded the proposed § 547.4(f)(iii) to eliminate the possibility of such an interpretation. The paragraph now reads: "A testing laboratory may provide the examination, testing, evaluating and reporting functions required by this section provided that: \* \* \* [i]t is not owned or operated by the same tribe or tribal gaming regulatory authority for whom it is providing the testing, evaluating, and reporting functions required by this section."

The only restriction intended in this section is a narrow one: that a lab owned or operated by a tribe should not test games for that tribe's gaming operations. The restriction is intended as means to ensure the independence of the laboratory

*Section 547.4(f)(1)(iv)(A)—Testing Laboratories, Suitability Determinations*

*Comment:* One commenter pointed out that there is a redundancy in making

the principals of testing laboratories subject to suitability determinations no less stringent than those in 25 CFR 533.6(b)(1)(ii)–(v) and in 25 CFR 533.6(c), because 533.6(b)(1)(v) and 533.6(c) contain the same standard, the former for Class II gaming management contracts and the latter for Class III gaming management contracts.

*Response:* The Commission agrees and has removed the redundancy. The paragraph now reads, "Makes a suitability determination of the testing laboratories no less stringent than that required by §§ 533.6(b)(1)(ii)–(v) of this chapter and based upon no less information than that required by § 537.1 of this chapter \* \* \*."

*Comment:* One commenter objected to the requirement that testing laboratories be subject to suitability determinations. The requirement, the commenter argued, acts as a barrier to entry to new tribally owned testing laboratories, which have not yet been subject to suitability determinations, and as a protectionist measure for the business of existing non-tribal testing laboratories, which have received such determinations.

*Response:* The Commission believes that the measure is necessary. Positions directly responsible for the integrity of gaming in any gaming jurisdiction, tribal or commercial—are, or ought to be, subject to licensure or suitability determinations. The comment seeks, in effect, exemption from this sound regulatory principle on the ground of commercial disadvantage, real or perceived.

**Comments on § 547.5, Fairness Standards and Rules of General Application**

*Section 547.5(c)—Minimum Probability Standards*

*Comment:* A number of commenters suggested that the minimum probability standards of 1 in 50,000,000 for progressive prizes and 1 in 25,000,000 for other prizes either be eliminated as contrary to IGRA or, if maintained, be lowered to match odds permitted by state lotteries, approximately 1 in 175,000,000, or Class III slot machines, 1 in 400,000,000 or less.

*Response:* The Commission disagrees that a minimum probability requirement is inconsistent with IGRA. As discussed in greater detail above, the Commission has the authority under IGRA to adopt minimum probability requirements for the same reason that it has the authority to adopt the Class II technical standards and Class II minimum internal control standards. Congress was expressly concerned that gaming under IGRA be

"conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). Both parts 543 and 547 are designed to protect the integrity of Class II gaming. The Technical Standards are intended to assure the fairness, integrity and safety of Class II games and equipment themselves, and the MICS are intended to assure the protection of tribal assets when the games and equipment are in operation in the gaming facility. Promulgating both of these sets of standards is consistent with the Commission's authority to monitor, inspect, and examine, Class II gaming, 25 U.S.C. 2706 (b)(1)–(4), and to promulgate such regulations as it deems appropriate to implement the provisions of IGRA. 25 U.S.C. 2706(b)(10).

Section 547(c) embodies a general prohibition upon cheating or misleading players. It contains two specific rules that implement this general prohibition. One is a requirement that all prizes advertised be available to win, and the other, which is related, is the minimum probability requirement. Having a minimum probability requirement ensures that there are no prizes that are theoretically available but will never, as a practical matter, be won.

For example, assume in a 75-ball bingo game the progressive prize is awarded when a unique 20-space pattern is hit on the first 20 numbers drawn. The chances of that occurring are 1 in 803,167,998,494,073,240. This is a prize that never will be hit. To put the number in perspective, it is not quite twice as many seconds as have elapsed since the Big Bang.

Nevertheless, as the intention of the minimum probability requirement is to mark an outer bound within which wagers are fair, the Commission agrees that the proposed limits of 1 in 50 million for progressive awards and 1 in 25 million for other award is not low enough and is changing the requirement to 1 in 100 million for progressive awards and 1 in 50 million for other awards.

These limits should provide an appropriate outer bound of fairness. For example, a progressive award with one chance to win in 100 million will hit, on average, one time every 100 million plays. If a system or systems linked to a common progressive award averages 250,000 plays a day, that works out to about 7.5 million plays per month, and it will take a little over one year, on average, to hit the award. The Commission believes that this sets an appropriate outer bound as players demand greater frequency in progressive awards than that.

*Section 547.5(c)—Fairness Standards*

*Comment:* One commenter suggested that the requirements of this paragraph—that Class II gaming systems shall not cheat, mislead, or disadvantage patrons—are not design standards, cannot be tested by a testing laboratory, and should be deleted. If the Commission retains them, the commenter suggested that the paragraph read that no gaming system “shall be designed to” do these things. Finally, the commenter suggested that as a standard, “disadvantaging” a player is subjective, not testable, could be construed to require that players always get their money back, and is not required in any gaming jurisdiction.

*Response:* The Commission disagrees in part and agrees in part. The word “disadvantage” adds nothing to the section an has been deleted. Other than this, however, the section remains as proposed. Simply put, gaming patrons should not be cheated or duped, unintentionally or intentionally.

**Comments Upon § 547.7, Minimum Hardware Standards***Section 547.7(b)—Printed Circuit Boards*

*Comment:* One commenter suggested striking the requirement that switches or jumpers on circuit boards that have the potential to affect the outcome or integrity of games, progressive awards, financial instruments, cashless transactions, voucher transactions, or accounting records be capable of being sealed. The commenter argued that the requirement is unnecessary and unduly burdensome.

*Response:* The Commission disagrees. The paragraph does not mandate that such switches or jumpers actually be sealed. Rather, the paragraph only requires that the switches or jumpers be capable of being sealed in the event that the tribal gaming regulatory authority so requires.

*Section 547.7(g)—Financial Instrument Storage Components, Security*

*Comment:* A number of commenters suggested that only those storage components not “designed to be” operated under the direct control of an employee be located in a secured cabinet. As written, this paragraph requires those components not actually so operated be located in a secured cabinet. Adding the words “designed to be” provides a standard to which a testing laboratory can test.

*Response:* The Commission disagrees with the necessity of such a change. Of course a testing laboratory can only assess a prototype’s design and cannot assess what happens once equipment is

placed on the gaming floor. The Commission is confident, however, that in most cases, equipment will be tested and used according to its intended design. In particular, however, the proposed change could have the unintended effect of handicapping the regulator. If, for example, a component designed to be used by an individual—say a point-of-sale cash drawer—could in practice be left alone without sufficient safeguard. Such a circumstance is undesirable and insecure but nevertheless compliant with the technical standards if they read as the commenters propose because the cash drawer was “designed to be” used under the control of an employee or agent.

*Section 547.7(k)(2)—Door Access Detection, Sensors*

*Comment:* One commenter suggested that the standard for door sensor security was impossible to meet—“It shall not be possible to disable a door open sensor \* \* \*”—and should be replaced with “shall be secure against attempts to disable \* \* \*”

*Response:* On the basis of this comment, the Commission reviewed this paragraph and determined both that it was both unclear and redundant. The security of door open sensors and components within cabinets is already addressed elsewhere under paragraph (k). The Commission therefore deleted 547.7(k)(2) and renumbered the remainder of paragraph (k) accordingly.

**Comments Upon § 547.8, Minimum Software Standards***Section 547.8(a)(1)(ii)—Display of Game Results*

*Comment:* One commenter suggested that the requirement that a player interface display “game results” be clarified and read “game results for the cards displayed on that player interface.” This would remove any implication that all other players’ results also have to be displayed.

*Response:* The Commission disagrees and believes the standard as written is sufficiently clear. Current electronic game systems are designed to display each player’s individual results, and nothing else is intended or should be read here.

*Section 547.8(a)(2)(ii) and Elsewhere—Game Recall, Alternate, Entertaining Displays.*

*Comment:* A number of commenters objected to the requirement that game recall functions have to be able to recall not only the final results of the last game played but also any associated

“alternative” display of results such as video reels that do not determine game outcome but are additional, separate, ways of displaying results for the player. The commenters contended that the Commission lacks the statutory authority to impose such a requirement. The commenters suggested as well that the requirement imbues alternative displays with legal significance that they do not have and that this can blur the line between Class II and Class III gaming. Finally, the commenters suggested that the requirement may work against its intended regulatory goal—to make easier the investigation and resolution of patron disputes—and give patrons legal rights based on the alternate displays that they otherwise would not have.

*Response:* The Commission disagrees. As a preliminary matter, the Commission observes that a number of major gaming system manufacturers already provide this feature. Thus, as they do by requiring independent laboratory testing of gaming systems, the Technical Standards do no more than formalize existing best practices.

The broad regulatory goal of the requirement is, as Congress stated, to ensure that gaming is “conducted fairly and honestly by both the operator and players.” 25 U.S.C. 2702(2). The requirement attempts to achieve this goal by creating a mechanism that gives tribal gaming regulatory authorities as much information as is possible when called upon to resolve patron disputes over the outcome of games. The investigating tribal gaming regulatory authority will have available to it both the results of the bingo game and of any entertaining display. Further, as this requirement formalizes existing practices, the Commission disagrees that it will inhibit, rather than make easier, the investigative job of the tribal gaming regulatory authority.

Requiring recall of entertaining displays will not blur the necessary distinction between Class II and Class III gaming. Indeed, the presence or absence of entertaining displays in a Class II game does not affect the classification of the game at all. Drawing that line was the primary regulatory goal of the now-discarded Classification regulations. The Technical Standards do not attempt to draw such a line. Rather, they assume that such a line already exists. They are, by design, applicable only to Class II gaming and are specifically designed to be applicable only to Class II gaming. They are organized around the concept of the “Class II gaming system” central to Class II gaming.

There is no intention by this requirement to give any legal

significance to entertaining displays. An entertaining display that malfunctions and appears to land on a winning combination when the game, in fact, was not won does not entitle a patron to any award, because prizes are determined only by bingo or the Class II game in question. 547.16(b)(1). Any malfunction, whether in a bingo game or in an entertaining display voids all prizes and plays. 547.16(b)(2). That said, to avoid any implication of legal significance in the term "alternate display," the Commission has changed the term to "entertaining display" throughout.

Finally, the Commission has the authority to promulgate the requirement here, just as it has the authority to promulgate the Technical Standards as a whole. As discussed in greater detail above, Congress was expressly concerned that gaming under IGRA be "conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). The Technical Standards are designed to protect the integrity of Class II gaming. The Technical Standards are intended to assure the fairness, integrity and safety of Class II games and equipment themselves. Promulgating the Technical Standards is consistent with the Commission's authority to monitor, inspect, and examine Class II gaming, 25 U.S.C. 2706 (b)(1)–(4), and to promulgate such regulations as it deems appropriate to implement the provisions of IGRA. 25 U.S.C. 2706(b)(10).

#### *Section 547.8(b)(1)—Game Initiation and Play*

*Comment:* A number of commenters suggested that the prohibition that "there shall be no automatic or undisclosed changes of rule" be amended to say that "there shall be no undisclosed changes of rules."

*Response:* The Commission disagrees. The prohibition is to be read with the first sentence of the paragraph, "[e]ach game played on the Class II gaming system shall follow and not deviate from a constant set of rules for each game provided to players. \* \* \* There shall be no automatic or undisclosed changes of rules." The intention is to prohibit the use of games or systems that base the outcome of a particular play, or that adjust the overall return to the player, on the outcome of previous plays. The outcome of any one particular game played must be independent of the outcome of all other games played.

This section is not intended to address, nor should it be construed to address, downloadable game software, which can occur automatically on a pre-

programmed schedule. Downloadable games are governed by § 547.12.

#### *Section 547.8(c)(2)—Audit Mode*

*Comment:* One commenter suggested defining what is meant by the requirement that audit mode be accessible by a "secure method."

*Response:* The Commission agrees and has added descriptive language. The paragraph now reads, "Audit mode shall be accessible by a secure method such as an employee PIN and key or other auditable access control."

#### *Section 547.8(b)(2) and Elsewhere—Applicability to Games Similar to Bingo*

*Comment:* A number of commenters requested that the Commission make part 547 applicable to bingo alone, rather than to games similar to bingo and other Class II games as well. Games similar to bingo may have individual considerations not addressed here and should be addressed in regulations designed specifically for them.

*Response:* The Commission disagrees. While games similar to bingo are not bingo, they are substantially similar, by definition, and can be played on the same systems. Failure to include games similar to bingo has the potential to leave some systems uncovered by this part. To the extent that a requirement in the technical standards is obviously inapplicable to a system offering a "game similar to bingo," then it does not apply. 547.5(b). To the extent that a requirement in the technical standards is ill fit to a "game similar to bingo" system, that can be managed through a variance, and part 547 will remain applicable to all games played on Class II gaming systems.

#### *Section 547.8(d)(4)(vii) and Elsewhere—Applicability to Pull Tabs*

*Comment:* A number of commenters requested that the Commission make part 547 applicable to bingo alone, rather than include pull tabs. Pull tabs may have individual considerations not addressed here and should be addressed in regulations designed specifically for them.

*Response:* The Commission disagrees. Again, failure to include pull tabs has the potential to leave some Class II gaming systems uncovered by this part. To the extent that a requirement in the technical standards is obviously inapplicable to a system offering pull tabs, then it does not apply. 547.5(b). To the extent that a requirement in the technical standards is ill fit to a pull tabs system, that can be managed through a variance. Part 547 will remain applicable to all games played on Class II gaming systems.

*Section 547.8(d)(4)(vii)—Pull Tabs*  
*Comment:* A number of commenters stated that for pull tabs, it is not possible to comply with all of the requirements of this section.

*Response:* The Commission disagrees. The requirements of § 547.8(d)(4)(vii) are specific to systems running pull tabs games. If there are portions of § 547.8 that are not obviously applicable to a Class II gaming system offering pull tabs, and if it is not possible to comply with some requirements because they are inapplicable, that is of no matter. The Technical Standards were specifically designed to be broadly and generally applicable to Class II gaming systems, no matter how any individual system implemented a particular game. Thus, bingo systems consisting of electronic client-server architectures and bingo systems involving a manual number draw and electronic bingo minders sold from a point-of-sale station are, for example, both within the ambit of the Technical Standards. Inevitably, there will be systems and situations where the Standards prescribe requirements that are simply inapplicable. When that is the case, the inapplicable standards are ignored, as the Technical Standards themselves instruct. Section 547.5(b) requires that gaming systems meet only "applicable requirements of this part."

#### **Comments Upon § 547.9, Accounting**

##### *Section 547.9(a)—Required Accounting Data*

*Comment:* A number of commenters suggested that Class II gaming systems should track not only "amount in" and "amount out," as those terms are described, but also "Bingo Sales" and "Prize Payouts," terms used in the proposed minimum internal control standards of part 543.

*Response:* The Commission disagrees. As the Technical Standards are designed to apply to Class II gaming systems essentially independent of what game is played on them, the more general terms "amount in" and "amount out" are more appropriate. The Commission would prefer "Bingo sales" and "prize payouts" only if it had decided to limit the application of the Technical Standards to bingo.

*Comment:* A number of commenters suggested that the descriptions and requirements of "amount in" and "amount out" would be clearer if financial instruments accepted had to be tracked "independently per financial instrument acceptor" and financial instruments dispensed had to be tracked "independently per financial instrument dispenser."

*Response:* The Commission agrees and has made the suggested change.

### Comments Upon § 547.11, Money and Credit Handling

#### Section 547.11(b)(5)(i)—Vouchers

*Comment:* One commenter suggested that there is no need to require both a gaming operation name and its location on coupons and vouchers. Moreover, the meaning of “location” is unclear as a location may be identified any number of ways.

*Response:* The Commission believes that the standard is appropriate as written. The purpose is to match vouchers and coupons to the gaming facility that issues and accepts them. Whether “location” is implemented as a city and state, as a street address, as a reservation, or as some combination of these is left up to the tribal gaming regulatory authority in its discretion.

### Comments Upon § 547.12, Software Downloads

*Comment:* A number of commenters suggested that some of the requirements in these paragraphs are not testable design standards but are operational standards that belong in the Class II MICS. These include the requirements that downloads shall be conducted only “as authorized” and that “the tribal gaming regulatory authority shall confirm verification” of the download.

*Response:* The Commission believes that these are some of the requirements that belong equally in the Technical Standards and MICS. To the extent that they appear in the Technical Standards, the requirements should be construed to mean that there must be some mechanism in the gaming system that will allow downloads to be authorized—e.g., password entry by an appropriate official—or to be confirmed—e.g. an audit trail reviewable by the tribal gaming regulatory authority. Accordingly, the Commission has amended the last sentence of § 547.12(b) to read, “Using any method it deems appropriate, the tribal gaming regulatory authority shall confirm the verification.” The complementary MICS governing access to and authorizations for information technology is found in § 543.16(a)–(c), and complementary standards for access verification are found in § 543.16(e).

### Comments Upon § 547.13, Program Storage Media

*Comment:* One commenter suggested that write-protected hard disks be permitted using software write protection verifiable by testing labs, such as Microsoft Enhanced Write Filter.

*Response:* The Commission agrees and has made the suggested change. The paragraph now reads, “Write protected hard disks are permitted if the hardware means of enabling the write protect is easily viewable and can be sealed in place. Write protected hard disks are permitted using software write protection verifiable by a testing laboratory.”

### Comments Upon § 547.14, Random Number Generation

*Comment:* One commenter suggested exempting bingo ball RNGs from the requirements of this section because broad tolerance levels in bingo balls manufacture create too great a variance in randomness. Testing bingo ball RNGs to the standards of this section is therefore not meaningful.

*Response:* The Commission agrees. However, § 547.14, by its terms, only applies to electronic RNGs. Bingo Ball RNGs are already exempt from the requirements of § 547.14.

### Comments Upon § 547.15, Electronic Data Communications Between System Components

*Comment:* One commenter suggested that the following should be deleted from § 547.15(e) as untestable by a testing laboratory and more appropriately placed in the MICS: “Remote communications shall only be allowed if authorized by the tribal gaming regulatory authority.”

*Response:* The Commission believes that these are also requirements that belong equally in the Technical Standards and MICS. To the extent that they appear in the Technical Standards, the requirements should be construed to mean that there be some mechanism in the gaming system that will enable and disable remote communications. This will allow the tribal gaming regulatory authority to authorize and control remote communications. Complementary MICS governing remote access are found in § 543.16(f).

### Comments Upon § 547.16—Game Artwork, Glass, Rules Etc.

*Comment:* One commenter suggested revising the section heading to refer to “information that must be made available to players.”

*Response:* The Commission believes that the intent and meaning of this section is adequately described by the language of the proposed rule.

### Comments Upon § 547.17—Variances

*Comment:* One commenter suggested that the heading in this section improperly refers to a “gaming operation” requesting a variance and

that it properly should refer to a “tribal gaming regulatory authority” requesting a variance as that is the apparent intent of the section.

*Response:* The Commission agrees and has made the suggested change.

### § 547.17(c)(6)—Appellate Procedure

*Comment:* A number of commenters suggested that this paragraph be amended to automatically affirm the tribal gaming regulatory authority’s determination if the Commission fails to make a decision on appeal within the time provided.

*Response:* The Commission agrees in part and has made the suggested change. In addition, the Commission recognizes that in rare or unusual instances, circumstances may require more than 30 days to issue a decision. Therefore, the Commission has added a provision enabling it to extend the deadline for decision an additional 30 days, but only upon the consent of the appellant tribal gaming regulatory authority. This calendaring mechanism also appears in 25 CFR part 539 governing management contract appeals, and the Commission finds that it works well.

### List of Subjects in 25 CFR Part 547

Gambling, Indian—lands, Indian—tribal government, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Commission amends 25 CFR Chapter III by adding Part 547 to read as follows:

### PART 547—MINIMUM TECHNICAL STANDARDS FOR GAMING EQUIPMENT USED WITH THE PLAY OF CLASS II GAMES

Sec.

- 547.1 What is the purpose of this part?
- 547.2 How do these regulations affect state jurisdiction?
- 547.3 What are the definitions for this part?
- 547.4 How does a tribal government, tribal gaming regulatory authority, or tribal gaming operation comply with this part?
- 547.5 What are the rules of interpretation and of general application for this part?
- 547.6 What are the minimum technical standards for enrolling and enabling Class II gaming system components?
- 547.7 What are the minimum technical hardware standards applicable to Class II gaming systems?
- 547.8 What are the minimum technical software standards applicable to Class II gaming systems?
- 547.9 What are the minimum technical standards for Class II gaming system accounting functions?
- 547.10 What are the minimum standards for Class II gaming system critical events?
- 547.11 What are the minimum technical standards for money and credit handling?

- 547.12 What are the minimum technical standards for downloading on a Class II gaming system?
- 547.13 What are the minimum technical standards for program storage media?
- 547.14 What are the minimum technical standards for electronic random number generation?
- 547.15 What are the minimum technical standards for electronic data communications between system components?
- 547.16 What are the minimum standards for game artwork, glass, and rules?
- 547.17 How does a tribal gaming regulatory authority apply for a variance from these standards?

**Authority:** 25 U.S.C. 2706(b).

#### **§ 547.1 What is the purpose of this part?**

The Indian Gaming Regulatory Act, 25 U.S.C. 2703(7)(A)(i), permits the use of electronic, computer, or other technologic aids in connection with the play of Class II games. This part establishes the minimum technical standards governing the use of such aids.

#### **§ 547.2 How do these regulations affect state jurisdiction?**

Nothing in this part shall be construed to grant to a state jurisdiction over Class II gaming or to extend a state's jurisdiction over Class III gaming.

#### **§ 547.3 What are the definitions for this part?**

For the purposes of this part, the following definitions apply:

**Account access component.** A component within a Class II gaming system that reads or recognizes account access media and gives a patron the ability to interact with his or her account.

**Account access medium.** A magnetic stripe card or any other medium inserted into, or otherwise made to interact with, an account access component in order to give a patron the ability to interact with an account.

**Audit mode.** The mode where it is possible to view Class II gaming system accounting functions, statistics, etc. and perform non-player-related functions.

**Agent.** An employee or other person authorized by the gaming operation, as approved by the tribal gaming regulatory authority, designated for certain decisions, tasks and actions in the gaming operation.

**Cancel credit.** An action initiated by the Class II gaming system where some or all of a player's credits are removed by an attendant and paid to the player.

**Cashless system.** A system that performs cashless transactions and maintains records of those cashless transactions.

**Cashless transaction.** A movement of funds electronically from one component to another, often to or from a patron deposit account.

**CD-ROM.** Compact Disc—Read Only Memory.

**Chairman.** The Chairman of the National Indian Gaming Commission.

**Class II game.** The same as "class II gaming" in 25 U.S.C. 2703(7)(A).

**Class II gaming system.** All components, whether or not technologic aids in electronic, computer, mechanical, or other technologic form, that function together to aid the play of one or more Class II games, including accounting functions mandated by these regulations.

**Commission.** The National Indian Gaming Commission established by the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*

**Coupon.** A financial instrument of fixed wagering value, usually paper, that can only be used to acquire non-cashable credits through interaction with a voucher system. This does not include instruments such as printed advertising material that cannot be validated directly by a voucher system.

**Critical memory.** Memory locations storing data essential to the functionality of the Class II gaming system.

**DLL.** A Dynamic-Link Library file.

**Download package.** Approved data sent to a component of a Class II gaming system for such purposes as changing the component software.

**DVD.** Digital Video Disk or Digital Versatile Disk.

**Electromagnetic interference.** The physical characteristic of an electronic component to emit electronic noise either into free air, onto the power lines, or onto communication cables.

**Electrostatic discharge.** A single-event, rapid transfer of electrostatic charge between two objects, usually resulting when two objects at different potentials come into direct contact with each other.

**EPROM.** Erasable Programmable Read Only Memory—a storage area that may be filled with data and information, that once written is not modifiable, and that is retained even if there is no power applied to the machine.

**Fault.** An event that when detected by a Class II gaming system causes a discontinuance of game play or other component functions.

**Financial instrument.** Any tangible item of value tendered in Class II game play, including, but not limited to, bills, coins, vouchers and coupons.

**Financial instrument acceptor.** Any component that accepts financial instruments.

**Financial instrument dispenser.** Any component that dispenses financial instruments.

**Financial instrument storage component.** Any component that stores financial instruments.

**Flash memory.** Non-volatile memory that retains its data when the power is turned off and that can be electronically erased and reprogrammed without being removed from the circuit board.

**Game software.** The operational program or programs that govern the play, display of results, and/or awarding of prizes or credits for Class II games.

**Gaming equipment.** All electronic, electro-mechanical, mechanical, or other physical components utilized in the play of Class II games.

**Hardware.** Gaming equipment.

**Interruption.** Any form of mis-operation, component failure, or interference to the Class II gaming equipment.

**Modification.** A revision to any hardware or software used in a Class II gaming system.

**Non-cashable credit.** Credits given by an operator to a patron; placed on an Class II gaming system through a coupon, cashless transaction or other approved means; and capable of activating play but not being converted to cash.

**Patron deposit account.** An account maintained on behalf of a patron, for the purpose of depositing and withdrawing cashable funds for the primary purpose of interacting with a gaming activity.

**Player interface.** Any component or components of a Class II gaming system, including an electronic or technologic aid (not limited to terminals, player stations, handhelds, fixed units, etc.), that directly enables player interaction in a Class II game.

**Prize schedule.** The set of prizes available to players for achieving pre-designated patterns in the Class II game.

**Program storage media.** An electronic data storage component, such as a CD-ROM, EPROM, hard disk, or flash memory on which software is stored and from which software is read.

**Progressive prize.** A prize that increases by a selectable or predefined amount based on play of a Class II game.

**Random number generator (RNG).** A software module, hardware component or combination of these designed to produce outputs that are effectively random.

**Reflexive software.** Any software that has the ability to manipulate and/or replace a randomly generated outcome for the purpose of changing the results of a Class II game.

**Removable/rewritable storage media.** Program or data storage components

that can be removed from gaming equipment and be written to, or rewritten by, the gaming equipment or by other equipment designed for that purpose.

**Server.** A computer that controls one or more applications or environments within a Class II gaming system.

**Test/diagnostics mode.** A mode on a component that allows various tests to be performed on the Class II gaming system hardware and software.

**Testing laboratory.** An organization recognized by a tribal gaming regulatory authority pursuant to § 547.4(f).

**Tribal gaming regulatory authority.** The entity authorized by tribal law to regulate gaming conducted pursuant to the Indian Gaming Regulatory Act.

**Voucher.** A financial instrument of fixed wagering value, usually paper, that can only be used to acquire an equivalent value of cashable credits or cash through interaction with a voucher system.

**Voucher system.** A component of the Class II gaming system or an external system that securely maintains records of vouchers and coupons; validates payment of vouchers; records successful or failed payments of vouchers and coupons; and controls the purging of expired vouchers and coupons.

**§ 547.4 How does a tribal government, tribal gaming regulatory authority, or tribal gaming operation comply with this part?**

(a) *Limited immediate compliance.* A tribal gaming regulatory authority shall:

(1) Require that all Class II gaming system software that affects the play of the Class II game be submitted, together with the signature verification required by § 547.8(f), to a testing laboratory recognized pursuant to paragraph (f) of this section within 120 days after November 10, 2008;

(2) Require that the testing laboratory test the submission to the standards established by § 547.8(b), § 547.8(f), § 547.14, the minimum probability standards of § 547.5(c), and to any additional technical standards adopted by the tribal gaming regulatory authority;

(3) Require that the testing laboratory provide the tribal gaming regulatory authority with a formal written report setting forth and certifying to the findings and conclusions of the test;

(4) Make a finding, in the form of a certificate provided to the supplier or manufacturer of the Class II gaming system, that the Class II gaming system qualifies for grandfather status under the provisions of this section, but only upon receipt of a testing laboratory's report that the Class II gaming system is compliant with § 547.8(b), § 547.8(f), the

minimum probability standards of § 547.5(c), § 547.14, and any other technical standards adopted by the tribal gaming regulatory authority. If the tribal gaming regulatory authority does not issue the certificate, or if the testing laboratory finds that the Class II gaming system is not compliant with § 547.8(b), § 547.8(f), the minimum probability standards of § 547.5(c), § 547.14, or any other technical standards adopted by the tribal gaming regulatory authority, then the gaming system shall immediately be removed from play and not be utilized.

(5) Retain a copy of any testing laboratory's report so long as the Class II gaming system that is the subject of the report remains available to the public for play;

(6) Retain a copy of any certificate of grandfather status so long as the Class II gaming system that is the subject of the certificate remains available to the public for play; and

(7) Require the supplier of any player interface to designate with a permanently affixed label each player interface with an identifying number and the date of manufacture or a statement that the date of manufacture was on or before the effective date of this part. The tribal gaming regulatory authority shall also require the supplier to provide a written declaration or affidavit affirming that the date of manufacture was on or before November 10, 2008.

(b) *Grandfather provisions.* All Class II gaming systems manufactured or placed in a tribal facility on or before the effective date of this part and certified pursuant to paragraph (a) of this section are grandfathered Class II gaming systems for which the following provisions apply:

(1) Grandfathered Class II gaming systems may continue in operation for a period of five years from November 10, 2008.

(2) Grandfathered Class II gaming system shall be available for use at any tribal gaming facility subject to approval by the tribal gaming regulatory authority, which shall transmit its notice of that approval, identifying the grandfathered Class II gaming system and its components, to the Commission.

(3) As permitted by the tribal gaming regulatory authority, individual hardware or software components of a grandfathered Class II gaming system may be repaired or replaced to ensure proper functioning, security, or integrity of the grandfathered Class II gaming system.

(4) All modifications that affect the play of a grandfathered Class II gaming system must be approved pursuant to

paragraph (c) of this section, except for the following:

(i) Any software modifications that the tribal gaming regulatory authority finds will maintain or advance the system's overall compliance with this part or any applicable provisions of parts 542 and 543 of this chapter, after receiving a new testing laboratory report that the modifications are compliant with the standards established by § 547.8(b), the minimum probability requirements of § 547.5(c), § 547.14, and any other standards adopted by the tribal gaming regulatory authority;

(ii) Any hardware modifications that the tribal gaming regulatory authority finds will maintain or advance the system's overall compliance with this part or any applicable provisions of parts 542 and 543 of this chapter; and

(iii) Any other modification to the software of a grandfathered Class II gaming system that the tribal gaming regulatory authority finds will not detract from, compromise or prejudice:

(A) The proper functioning, security, or integrity of the Class II gaming system, and

(B) The gaming system's overall compliance with the requirements of this part or any applicable provisions of parts 542 and 543 of this chapter.

(iv) No such modification may be implemented without the approval of the tribal gaming regulatory authority. The tribal gaming regulatory authority shall maintain a record of the modification so long as the Class II gaming system that is the subject of the modification remains available to the public for play and shall make the record available to the Commission upon request. The Commission will only make available for public review records or portions of records subject to release under the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; or the Indian Gaming Regulatory Act, 25 U.S.C. 2716(a).

(c) *Submission, testing, and approval—generally.* Except as provided in paragraphs (b) and (d) of this section, no tribal gaming regulatory authority shall permit in a tribal gaming operation the use of any Class II gaming system, or any associated cashless system or voucher system or any modification thereto, unless:

(1) The Class II gaming system, cashless system, voucher payment system, or modification has been submitted to a testing laboratory;

(2) The testing laboratory tests the submission to the standards established by:

(i) This part;

(ii) Any applicable provisions of parts 542 and 543 of this chapter that are testable by the testing laboratory; and

(iii) The tribal gaming regulatory authority;

(3) The testing laboratory provides a formal written report to the party making the submission, setting forth and certifying to its findings and conclusions; and

(4)(i) Following receipt of the testing laboratory's report, the tribal gaming regulatory authority makes a finding that the Class II gaming system, cashless system, or voucher system conforms to the standards established by:

(A) This part;

(B) Any applicable provisions of parts 542 and 543 of this chapter that are testable by the testing laboratory; and

(C) The tribal gaming regulatory authority.

(ii) The tribal gaming regulatory authority shall retain a copy of the testing laboratory's report so long as the Class II gaming system, cashless system, voucher system, or modification thereto that is the subject of the report remains available to the public for play in its gaming operation.

(d) *Emergency hardware and software modifications.* (1) A tribal gaming regulatory authority, in its discretion, may permit modified hardware or software to be made available for play without prior laboratory testing or review if the modified hardware or software is:

(i) Necessary to correct a problem affecting the fairness, security, or integrity of a game or accounting system or any cashless system, or voucher system; or

(ii) Unrelated to game play, an accounting system, a cashless system, or a voucher system.

(2) If a tribal gaming regulatory authority authorizes new or modified software or hardware to be made available for play or use without prior testing laboratory review, the tribal gaming regulatory authority shall thereafter require the hardware or software manufacturer to:

(i) Immediately advise other users of the same hardware or software of the importance and availability of the update;

(ii) Immediately submit the new or modified hardware or software to a testing laboratory for testing and verification of compliance with this part and any applicable provisions of parts 542 and 543 of this chapter that are testable by the testing laboratory; and

(iii) Immediately provide the tribal gaming regulatory authority with a software signature verification tool

meeting the requirements of § 547.8(f) for any new or modified software.

(3) If a tribal gaming regulatory authority authorizes a software or hardware modification under this paragraph, it shall maintain a record of the modification and a copy of the testing laboratory report so long as the Class II gaming system that is the subject of the modification remains available to the public for play and shall make the record available to the Commission upon request. The Commission will only make available for public review records or portions of records subject to release under the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; or the Indian Gaming Regulatory Act, 25 U.S.C. 2716(a).

(e) *Compliance by charitable gaming operations.* This part shall not apply to charitable gaming operations, provided that:

(1) The tribal government determines that the organization sponsoring the gaming operation is a charitable organization;

(2) All proceeds of the charitable gaming operation are for the benefit of the charitable organization;

(3) The tribal gaming regulatory authority permits the charitable organization to be exempt from this part;

(4) The charitable gaming operation is operated wholly by the charitable organization's employees or volunteers; and

(5) The annual gross gaming revenue of the charitable gaming operation does not exceed \$1,000,000.

(f) *Testing laboratories.* (1) A testing laboratory may provide the examination, testing, evaluating and reporting functions required by this section provided that:

(i) It demonstrates its integrity, independence and financial stability to the tribal gaming regulatory authority.

(ii) It demonstrates its technical skill and capability to the tribal gaming regulatory authority.

(iii) It is not owned or operated by the same tribe or tribal gaming regulatory authority for whom it is providing the testing, evaluating, and reporting functions required by this section.

(iv) The tribal gaming regulatory authority:

(A) Makes a suitability determination of the testing laboratory based upon standards no less stringent than those set out in §§ 533.6(b)(1)(ii) through (v) of this chapter and based upon no less information than that required by § 537.1 of this chapter, or

(B) Accepts, in its discretion, a determination of suitability for the

testing laboratory made by any other gaming regulatory authority in the United States.

(v) After reviewing the suitability determination and the information provided by the testing laboratory, the tribal gaming regulatory authority determines that the testing laboratory is qualified to test and evaluate Class II gaming systems.

(2) The tribal gaming regulatory authority shall:

(i) Maintain a record of all determinations made pursuant to paragraphs (f)(1)(iv) and (f)(1)(v) of this section for a minimum of three years and shall make the records available to the Commission upon request. The Commission will only make available for public review records or portions of records subject to release under the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; or the Indian Gaming Regulatory Act, 25 U.S.C. 2716(a).

(ii) Place the testing laboratory under a continuing obligation to notify it of any adverse regulatory action in any jurisdiction where the testing laboratory conducts business.

(iii) Require the testing laboratory to provide notice of any material changes to the information provided to the tribal gaming regulatory authority.

#### **§ 547.5 What are the rules of interpretation and of general application for this part?**

(a) *Minimum standards.* A tribal gaming regulatory authority may establish and implement additional technical standards that are as stringent as, or more stringent than, those set out in this part.

(b) *Only applicable standards apply.* Gaming equipment and software used with Class II gaming systems shall meet all applicable requirements of this part. For example, if a Class II gaming system lacks the ability to print or accept vouchers, then any standards that govern vouchers do not apply.

(c) *Fairness.* No Class II gaming system shall cheat or mislead users. All prizes advertised shall be available to win. No progressive prize shall have a probability of winning less than 1 in 100,000,000. No other prize shall have a probability of winning less than 1 in 50,000,000.

(d) *Approved equipment and software only.* All gaming equipment and software used with Class II gaming systems shall be identical in all respects to a prototype reviewed and tested by a testing laboratory and approved for use by the tribal gaming regulatory authority pursuant to § 547.4(a) through (c). Unapproved software shall not be loaded onto or stored on any program

storage medium used in a Class II gaming system, except as provided in § 547.4(d).

(e) *Proper functioning.* All gaming equipment and software used with Class II gaming systems shall perform according to the manufacturer's design and operating specifications.

(f) *No Limitation of Technology.* This part should not be interpreted to limit the use of technology or to preclude the use of technology not specifically referenced.

(g) *Severability.* If any provision of this part is declared invalid by a court of competent jurisdiction, such decision shall not affect the remainder of this part.

**§ 547.6 What are the minimum technical standards for enrolling and enabling Class II gaming system components?**

(a) *General requirements.* Class II gaming systems shall provide a method to:

- (1) Enroll and unenroll system components;
- (2) Enable and disable specific system components.

(b) *Specific requirements.* Class II gaming systems shall:

- (1) Ensure that only enrolled and enabled system components participate in gaming; and
- (2) Ensure that the default condition for components shall be unenrolled and disabled.

**§ 547.7 What are the minimum technical hardware standards applicable to Class II gaming systems?**

(a) *General requirements.* (1) The Class II gaming system shall operate in compliance with applicable regulations of the Federal Communications Commission.

(2) Prior to approval by the tribal gaming regulatory authority pursuant to § 547.4(c), the Class II gaming system shall have obtained from Underwriters' Laboratories, or its equivalent, relevant certification(s) required for equipment of its type, including but not limited to certifications for liquid spills, electromagnetic interference, etc.

(b) *Printed circuit boards.* (1) Printed circuit boards that have the potential to affect the outcome or integrity of the game, and are specially manufactured or proprietary and not off-the-shelf, shall display a unique identifier such as a part number and/or revision number, which shall be updated to reflect new revisions or modifications of the board.

(2) Switches or jumpers on all circuit boards that have the potential to affect the outcome or integrity of any game, progressive award, financial instrument, cashless transaction, voucher

transaction, or accounting records shall be capable of being sealed.

(c) *Electrostatic discharge.* Class II gaming system components accessible to the public shall be constructed so that they exhibit immunity to human body electrostatic discharges on areas exposed to contact. Static discharges of  $\pm 15$  kV for air discharges and  $\pm 7.5$  kV for contact discharges may not cause damage, or inhibit operation or integrity of the Class II gaming system.

(d) *Physical enclosures.* Physical enclosures shall be of a robust construction designed to resist determined illegal entry. All protuberances and attachments such as buttons, identification plates, and labels shall be sufficiently robust to avoid unauthorized removal.

(e) *Player interface.* The player interface shall include a method or means to:

- (1) Display information to a player; and
- (2) Allow the player to interact with the Class II gaming system.

(f) *Account access components.* A Class II gaming system component that reads account access media shall be located within a secure, locked or tamper-evident area or in a cabinet or housing that is of a robust construction designed to resist determined illegal entry and to protect internal components. In addition, the account access component:

- (1) Shall be constructed so that physical tampering leaves evidence of such tampering; and
- (2) Shall provide a method to enable the Class II gaming system to interpret and act upon valid or invalid input or error condition.

(g) *Financial instrument storage components.* Any Class II gaming system components that store financial instruments and that are not operated under the direct control of a gaming operation employee or agent shall be located within a secure and locked area or in a locked cabinet or housing that is of a robust construction designed to resist determined illegal entry and to protect internal components.

(h) *Financial instrument acceptors.* (1) Any Class II gaming system components that handle financial instruments and that are not operated under the direct control of an agent shall:

- (i) Be located within a secure, locked and tamper-evident area or in a locked cabinet or housing that is of a robust construction designed to resist determined illegal entry and to protect internal components;
- (ii) Be able to detect the entry of valid or invalid financial instruments and to provide a method to enable the Class II

gaming system to interpret and act upon valid or invalid input or error condition; and

(iii) Be constructed to permit communication with the Class II gaming system of the accounting information required by § 547.9(a) and by applicable provisions of any Commission and tribal gaming regulatory regulations governing minimum internal control standards.

(2) Prior to completion of a valid financial instrument transaction by the Class II gaming system, no monetary amount related to that instrument shall be available for play. For example, credits shall not be available for play until currency or coupon inserted into an acceptor is secured in the storage component.

(3) The monetary amount related to all valid financial instrument transactions by the Class II gaming system shall be recorded as required by § 547.9(a) and the applicable provisions of any Commission and tribal gaming regulatory authority regulations governing minimum internal control standards.

(i) *Financial instrument dispensers.*

(1) Any Class II gaming system components that dispense financial instruments and that are not operated under the direct control of a gaming operation employee or agent shall:

(i) Be located within a secure, locked and tamper-evident area or in a locked cabinet or housing that is of a robust construction designed to resist determined illegal entry and to protect internal components;

(ii) Provide a method to enable the Class II gaming system to interpret and act upon valid or invalid input or error condition; and

(iii) Be constructed to permit communication with the Class II gaming system of the accounting information required by § 547.9(a) and by applicable provisions of any Commission and tribal gaming regulatory regulations governing minimum internal control standards.

(2) The monetary amount related to all valid financial instrument transactions by the Class II gaming system shall be recorded as required by § 547.9(a), the applicable provisions of parts 542 and 543 of this chapter, and any tribal gaming regulatory authority regulations governing minimum internal control standards.

(j) *Game Outcome Determination Components.* Any Class II gaming system logic components that affect the game outcome and that are not operated under the direct control of a gaming operation employee or agent shall be located within a secure, locked and tamper-evident area or in a locked cabinet or housing that is of a robust

construction designed to resist determined illegal entry and to protect internal components. DIP switches or jumpers that can affect the integrity of the Class II gaming system must be capable of being sealed by the tribal gaming regulatory authority.

(k) *Door access detection.* All components of the Class II gaming system that are locked in order to meet the requirements of this part shall include a sensor or other methods to monitor an open door. A door open sensor, and its components or cables, shall be secure against attempts to disable them or interfere with their normal mode of operation;

(l) *Separation of functions/no limitations on technology.* Nothing herein shall prohibit the account access component, financial instrument storage component, financial instrument acceptor, and financial instrument dispenser from being included within the same component, or separated into individual components.

**§ 547.8 What are the minimum technical software standards applicable to Class II gaming systems?**

This section provides general software standards for Class II gaming systems for the play of Class II games.

(a) *Player interface displays.* (1) If not otherwise provided to the player, the player interface shall display the following:

- (i) The purchase or wager amount;
- (ii) Game results; and
- (iii) Any player credit balance.

(2) Between plays of any game and until the start of the next play, or until the player selects a new game option such as purchase or wager amount or card selection, whichever is earlier, if not otherwise provided to the player, the player interface shall display:

- (i) The total purchase or wager amount and all prizes and total credits won for the last game played;
- (ii) The final results for the last game played, including entertaining displays of results, if any; and
- (iii) Any default purchase or wager amount for the next play.

(b) *Game initiation and play.* (1) Each game played on the Class II gaming system shall follow and not deviate from a constant set of rules for each game provided to players pursuant to § 547.16. Any change in rules constitutes a different game. There shall be no automatic or undisclosed changes of rules.

(2) For bingo games and games similar to bingo, the Class II gaming system shall not alter or allow to be altered the card permutations or game rules used for play of a Class II game unless

specifically chosen by the player prior to commitment to participate in the game. No duplicate cards shall be sold for any common draw.

(3) No game play shall commence and, no financial instrument or credit shall be accepted on the affected player interface, in the presence of any fault condition that affects the outcome of the game, open door, or while in test, audit, or lock-up mode.

(4) The player must choose to participate in the play of a game.

(c) *Audit Mode.* (1) If an audit mode is provided, the Class II gaming system shall provide, for those components actively involved in the audit:

(i) All accounting functions required by § 547.9, by applicable provisions of any Commission regulations governing minimum internal control standards, and by any internal controls adopted by the tribe or tribal gaming regulatory authority;

(ii) Display player interface identification; and

(iii) Display software version or game identification;

(2) Audit mode shall be accessible by a secure method such as an employee PIN and key or other auditable access control.

(3) Accounting function data shall be accessible by an authorized person at any time, except during a payout, during a handpay, or during play.

(4) The Class II gaming system shall disable financial instrument acceptance on the affected player interface while in audit mode, except during financial instrument acceptance testing.

(d) *Last game recall.* The last game recall function shall:

(1) Be retrievable at all times, other than when the recall component is involved in the play of a game, upon the operation of an external key-switch, entry of an audit card, or a similar method;

(2) Display the results of recalled games as originally displayed or in text representation, including entertaining display results implemented in video, rather than electro-mechanical, form, if any, so as to enable the tribal gaming regulatory authority or operator to clearly identify the game sequences and results that occurred;

(3) Allow the Class II gaming system component providing game recall, upon return to normal game play mode, to restore any affected display to the positions, forms and values displayed before access to the game recall information; and

(4) Provide the following information for the current and previous four games played and shall display:

(i) Game start time, end time, and date;

(ii) The total number of credits at the start of play, less the purchase or wager amount;

(iii) The purchase or wager amount;

(iv) The total number of credits at the end of play; and

(v) The total number of credits won as a result of the game recalled, and the value in dollars and cents for progressive prizes, if different.

(vi) For bingo games and games similar to bingo only, also display:

(A) The card(s) used by the player;

(B) The identifier of the bingo game played;

(C) The numbers or other designations drawn, in the order that they were drawn;

(D) The numbers or other designations and prize patterns covered on each card;

(E) All prizes won by the player, including winning patterns and entertaining displays implemented in video, rather than electro-mechanical form, if any; and

(F) The unique identifier of the card on which prizes were won;

(vii) For pull-tab games only, also display:

(A) The result(s) of each pull-tab, displayed in the same pattern as on the tangible pull-tab;

(B) All prizes won by the player;

(C) The unique identifier of each pull tab; and

(D) Any other information necessary to fully reconstruct the current and four previous plays.

(e) *Voucher and credit transfer recall.* Notwithstanding the requirements of any other section in this part, a Class II gaming system shall have the capacity to:

(1) Display the information specified in § 547.11(b)(5)(ii) through (vi) for the last five vouchers or coupons printed and the last five vouchers or coupons accepted; and

(2) Display a complete transaction history for the last five cashless transactions made and the last five cashless transactions accepted.

(f) *Software signature verification.* The manufacturer or developer of the Class II gaming system must provide to the testing laboratory and to the tribal gaming regulatory authority an industry-standard methodology, acceptable to the tribal gaming regulatory authority, for verifying the Class II gaming system game software. By way of illustration, for game software stored on rewritable media, such methodologies include signature algorithms and hashing formulas such as SHA-1.

(g) *Test, diagnostic, and demonstration modes.* If test, diagnostic,

and/or demonstration modes are provided, the Class II gaming system shall, for those components actively involved in the test, diagnostic, or demonstration mode:

(1) Clearly indicate when that component is in the test, diagnostic, or demonstration mode;

(2) Not alter financial data on that component other than temporary data;

(3) Only be available after entering a specific mode;

(4) Disable credit acceptance and payment unless credit acceptance or payment is being tested; and

(5) Terminate all mode-specific functions upon exiting a mode.

(h) *Multi-game*. If multiple games are offered for player selection at the player interface, the player interface shall:

(1) Provide a display of available games;

(2) Provide the means of selecting among them;

(3) Display the full amount of the player's credit balance;

(4) Identify the game selected or being played; and

(5) Not force the play of a game after its selection.

(i) *Program interruption and resumption*. The Class II gaming system software shall be designed so that upon resumption following any interruption, the system:

(1) Is able to return to a known state;

(2) Shall check for any fault condition upon resumption;

(3) Shall verify the integrity of data stored in critical memory;

(4) Shall return the purchase or wager amount to the player in accordance with the rules of the game; and

(5) Shall detect any change or corruption in the Class II gaming system software.

(j) *Class II gaming system components acting as progressive controllers*. This paragraph applies to progressive controllers and components acting as

progressive controllers in Class II gaming systems.

(1) Modification of progressive parameters shall be conducted in a secure manner approved by the tribal gaming regulatory authority. Such parameters may include:

(i) Increment value;

(ii) Secondary pool increment(s);

(iii) Reset amount(s);

(iv) Maximum value(s); and

(v) Identity of participating player interfaces.

(2) The Class II gaming system component or other progressive controller shall provide a means of creating a progressive balancing report for each progressive link it controls. At a minimum, that report shall provide balancing of the changes of the progressive amount, including progressive prizes won, for all participating player interfaces versus current progressive amount(s), plus progressive prizes. In addition, the report shall account for, and not be made inaccurate by, unusual events such as:

(i) Class II gaming system critical memory clears;

(ii) Modification, alteration, or deletion of progressive prizes;

(iii) Offline equipment; or

(iv) Multiple site progressive prizes.

(k) *Critical memory*. (1) Critical memory may be located anywhere within the Class II gaming system. Critical memory is any memory that maintains any of the following data:

(i) Accounting data;

(ii) Current credits;

(iii) Configuration data;

(iv) Last game recall information required by § 547.8(d);

(v) Game recall information for the current game, if incomplete;

(vi) Software state (the last normal state software was in before interruption);

(vii) RNG seed(s), if necessary for maintaining integrity;

(viii) Encryption keys, if necessary for maintaining integrity;

(ix) Progressive prize parameters and current values;

(x) The five most recent financial instruments accepted by type, excluding coins and tokens;

(xi) The five most recent financial instruments dispensed by type, excluding coins and tokens; and

(xii) The five most recent cashless transactions paid and the five most recent cashless transactions accepted.

(2) Critical memory shall be maintained using a methodology that enables errors to be identified and acted upon. All accounting and recall functions shall be verified as necessary to ensure their ongoing integrity.

(3) The validity of affected data stored in critical memory shall be checked after each of the following events:

(i) Every restart;

(ii) Each attendant paid win;

(iii) Each attendant paid progressive win;

(iv) Each sensed door closure; and

(v) Every reconfiguration, download, or change of prize schedule or denomination requiring operator intervention or action.

(l) *Secured access*. Class II gaming systems that use a logon or other means of secured access shall include a user account lockout after a predetermined number of consecutive failed attempts to access system.

**§ 547.9 What are the minimum technical standards for Class II gaming system accounting functions?**

This section provides standards for accounting functions used in Class II gaming systems.

(a) *Required accounting data*. The following minimum accounting data, however named, shall be maintained by the Class II gaming system.

Title	Description
(1) Amount In .....	The total value of all financial instruments and cashless transactions accepted by the Class II gaming system. Each type of financial instrument accepted by the Class II gaming system shall be tracked independently per financial instrument acceptor, and as required by applicable requirements of any Commission and tribal gaming regulatory authority regulations governing minimum internal control standards.
(2) Amount Out .....	The total value of all financial instruments and cashless transactions paid by the Class II gaming system, plus the total value of attendant pay. Each type of financial instrument paid by the Class II Gaming System shall be tracked independently per financial instrument dispenser, and as required by applicable requirements of any Commission and tribal gaming regulatory authority regulations governing minimum internal control standards.

(b) *Accounting data storage*. If the Class II gaming system electronically maintains accounting data:

(1) Accounting data shall be stored with at least eight decimal digits.

(2) Credit balances shall have sufficient digits to accommodate the design of the game.

(3) Accounting data displayed to the player may be incremented or decremented using visual effects, but the internal storage of this data shall be immediately updated in full.

(4) Accounting data shall be updated upon the occurrence of the relevant accounting event.

(5) Modifications to accounting data shall be recorded, including the identity of the person(s) making the modifications, and be reportable by the Class II gaming system.

(c) *Rollover.* Accounting data that rolls over to zero shall not corrupt data.

(d) *Credit balance display and function.* (1) Any credit balance

maintained at the player interface shall be prominently displayed at all times except:

(i) In audit, configuration, recall and test modes; or

(ii) Temporarily, during entertaining displays of game results.

(2) Progressive prizes may be added to the player's credit balance provided:

(i) The player credit balance is maintained in dollars and cents;

(ii) The progressive accounting data is incremented in number of credits; or

(iii) The prize in dollars and cents is converted to player credits or transferred to the player's credit balance in a manner that does not mislead the player or cause accounting imbalances.

(3) If the player credit balance displays in credits, but the actual balance includes fractional credits, the Class II gaming system shall display the fractional credit when the player credit balance drops below one credit.

**§ 547.10 What are the minimum standards for Class II gaming system critical events?**

This section provides standards for events such as system critical faults, deactivation, door open or other changes of states, and lockup within the Class II gaming system.

(a) *Fault events.* (1) The following events are to be treated as described below:

Events	Definition and action to be taken
(i) Component fault .....	Reported when a fault on a component is detected. When possible, this event message should indicate what the nature of the fault is.
(ii) Financial storage component full .....	Reported when a financial instrument acceptor or dispenser includes storage, and it becomes full. This event message should indicate what financial storage component is full.
(iii) Financial output component empty .....	Reported when a financial instrument dispenser is empty. The event message should indicate which financial output component is affected, and whether it is empty.
(iv) Financial component fault .....	Reported when an occurrence on a financial component results in a known fault state.
(v) Critical memory error .....	Some critical memory error has occurred. When a non-correctable critical memory error has occurred, the data on the Class II gaming system component can no longer be considered reliable. Accordingly, any game play on the affected component shall cease immediately, and an appropriate message shall be displayed, if possible.
(vi) Progressive communication fault .....	If applicable; when communications with a progressive controller component is in a known fault state.
(vii) Program storage medium fault .....	The software has failed its own internal security check or the medium itself has some fault. Any game play on the affected component shall cease immediately, and an appropriate message shall be displayed, if possible.

(2) The occurrence of any event identified in paragraph (a)(1) of this section shall be recorded.

(3) Upon clearing any event identified in paragraph (a)(1) of this section, the Class II gaming system shall:

(i) Record that the fault condition has been cleared;

(ii) Ensure the integrity of all related accounting data; and

(iii) In the case of a malfunction, return a player's purchase or wager according to the rules of the game.

(b) *Door open/close events.* (1) In addition to the requirements of paragraph (a)(1) of this section, the Class II gaming system shall perform the following for any component affected by any sensed door open event:

(i) Indicate that the state of a sensed door changes from closed to open or opened to closed;

(ii) Disable all financial instrument acceptance, unless a test mode is entered;

(iii) Disable game play on the affected player interface;

(iv) Disable player inputs on the affected player interface, unless test mode is entered; and

(v) Disable all financial instrument disbursement, unless a test mode is entered.

(2) The Class II gaming system may return the component to a ready to play state when all sensed doors are closed.

(c) *Non-fault events.* (1) The following non-fault events are to be treated as described below, if applicable:

Event	Definition and action to be taken
(i) Player interface power off during play .....	This condition is reported by the affected component(s) to indicate power has been lost during game play.
(ii) Player interface power on .....	This condition is reported by the affected component(s) to indicate it has been turned on.
(iii) Financial instrument storage component container/stacker removed.	This condition is reported when a financial instrument storage container has been removed. The event message should indicate which storage container was removed.

**§ 547.11 What are the minimum technical standards for money and credit handling?**

This section provides standards for money and credit handling by a Class II gaming system.

(a) *Credit acceptance, generally.* (1) Upon any credit acceptance, the Class II gaming system shall register the correct number of credits on the player's credit balance.

(2) The Class II gaming system shall reject financial instruments deemed invalid.

(b) *Credit redemption, generally.* (1) For cashable credits on a player interface, players shall be allowed to

cash out and/or redeem those credits at the player interface except when that player interface is:

- (i) Involved in the play of a game;
- (ii) In audit mode, recall mode or any test mode;
- (iii) Detecting any sensed door open condition;
- (iv) Updating the player credit balance or total win accounting data; or
- (v) Displaying a fault condition that would prevent cash-out or credit redemption. In this case a fault indication shall be displayed.

(2) For cashable credits not on a player interface, the player shall be allowed to cash out and/or redeem those credits at any time.

(3) A Class II gaming system shall not automatically pay an award subject to mandatory tax reporting or withholding.

(4) Credit redemption by voucher or coupon shall conform to the following:

(i) A Class II gaming system may redeem credits by issuing a voucher or coupon when it communicates with a voucher system that validates the voucher or coupon.

(ii) A Class II gaming system that redeems credits by issuing vouchers and coupons shall either:

(A) Maintain an electronic record of all information required by paragraphs (b)(5)(ii) through (vi) of this section; or

(B) Generate two identical copies of each voucher or coupon issued, one to be provided to the player and the other to be retained within the machine for audit purposes.

(5) Valid vouchers and coupons shall contain the following:

(i) Gaming operation name and location;

(ii) The identification number of the Class II gaming system component or the player interface number, as applicable;

(iii) Date and time of issuance;

(iv) Alpha and numeric dollar amount;

(v) A sequence number;

(vi) A validation number that:

(A) Is produced by a means specifically designed to prevent repetition of validation numbers; and

(B) Has some form of checkcode or other form of information redundancy to prevent prediction of subsequent validation numbers without knowledge of the checkcode algorithm and parameters;

(vii) For machine-readable vouchers and coupons, a bar code or other form of machine readable representation of the validation number, which shall have enough redundancy and error checking to ensure that 99.9% of all misreads are flagged as errors;

(viii) Transaction type or other method of differentiating voucher and coupon types; and

(ix) Expiration period or date.

(6) Transfers from an account may not exceed the balance of that account.

(7) For Class II gaming systems not using dollars and cents accounting and not having odd cents accounting, the Class II gaming system shall reject any transfers from voucher payment systems or cashless systems that are not even multiples of the Class II gaming system denomination.

(8) Voucher redemption systems shall include the ability to report redemptions per redemption location or user.

#### **§ 547.12 What are the minimum technical standards for downloading on a Class II gaming system?**

This section provides standards for downloading on a Class II gaming system.

(a) *Downloads.* (1) Downloads are an acceptable means of transporting approved content, including but not limited to software, files, data, and prize schedules.

(2) Downloads of software, games, prize schedules, or other download packages shall be conducted only as authorized by the tribal gaming regulatory authority.

(3) Downloads shall use secure methodologies that will deliver the download data without alteration or modification, in accordance with § 547.15(a).

(4) Downloads conducted during operational periods shall be performed in a manner that will not affect game play.

(5) Downloads shall not affect the integrity of accounting data.

(6) The Class II gaming system or the tribal gaming regulatory authority shall log each download of any download package. Each log record shall contain as a minimum:

(i) The time and date of the initiation of the download;

(ii) The time and date of the completion of the download;

(iii) The Class II gaming system components to which software was downloaded;

(iv) The version(s) of download package and any software downloaded. Logging of the unique software signature will satisfy this requirement;

(v) The outcome of any software verification following the download (success or failure); and

(vi) The name and identification number, or other unique identifier, of any individual(s) conducting or scheduling a download.

(b) *Verifying downloads.* Following download of any game software, the Class II gaming system shall verify the downloaded software using a software signature verification method that meets the requirements of § 547.8(f). Using any method it deems appropriate, the tribal gaming regulatory authority shall confirm the verification.

#### **§ 547.13 What are the minimum technical standards for program storage media?**

This section provides minimum standards for removable, (re-)writable, and nonwritable storage media in Class II gaming systems.

(a) *Removable program storage media.* All removable program storage media shall maintain an internal checksum or signature of its contents. Verification of this checksum or signature is to be performed after every restart. If the verification fails, the affected Class II gaming system component(s) shall lock up and enter a fault state.

(b) *Nonrewritable program storage media.* (1) All EPROMs and Programmable Logic Devices (PLDs) that have erasure windows shall be fitted with covers over their erasure windows.

(2) All unused areas of EPROMs shall be written with the inverse of the erased state (e.g., zero bits (00 hex) for most EPROMs), random data, or repeats of the program data.

(3) Flash memory storage components intended to have the same logical function as ROM, *i.e.* not to be dynamically written, shall be write-protected or otherwise protected from unauthorized modification.

(4) The write cycle shall be closed or finished for all CD-ROMs such that it is not possible to write any further data to the CD.

(5) Write protected hard disks are permitted if the hardware means of enabling the write protect is easily viewable and can be sealed in place. Write protected hard disks are permitted using software write protection verifiable by a testing laboratory.

(c) *Writable and rewritable program storage media.* (1) Writable and rewritable program storage, such as hard disk drives, Flash memory, writable CD-ROMs, and writable DVDs, may be used provided that the software stored thereon may be verified using the mechanism provided pursuant to § 547.8(f).

(2) Program storage shall be structured so there is a verifiable separation of fixed data (e.g. program, fixed parameters, DLLs) and variable data.

(d) *Identification of program storage media.* All program storage media that is not rewritable in circuit, (e.g. EPROM,

CD-ROM) shall be uniquely identified, displaying:

- (1) Manufacturer;
- (2) Program identifier;
- (3) Program version number(s); and
- (4) Location information, if critical (e.g. socket position 3 on the printed circuit board).

**§ 547.14 What are the minimum technical standards for electronic random number generation?**

This section provides minimum standards for electronic RNGs in Class II gaming systems.

(a) *Properties.* All RNGs shall produce output having the following properties:

- (1) Statistical randomness;
- (2) Unpredictability; and
- (3) Non-repeatability.

(b) *Statistical Randomness.* (1)

Numbers produced by an RNG shall be statistically random individually and in the permutations and combinations used in the application under the rules of the game. For example, if a bingo game with 75 objects with numbers or other designations has a progressive winning pattern of the five numbers or other designations on the bottom of the card and the winning of this prize is defined to be the five numbers or other designations are matched in the first five objects drawn, the likelihood of each of the 75C5 combinations are to be verified to be statistically equal.

(2) Numbers produced by an RNG shall pass the statistical tests for randomness to a 99% confidence level, which may include:

- (i) Chi-square test;
- (ii) Equi-distribution (frequency) test;
- (iii) Gap test;
- (iv) Poker test;
- (v) Coupon collector's test;
- (vi) Permutation test;
- (vii) Run test (patterns of occurrences shall not be recurrent);
- (viii) Spectral test;
- (ix) Serial correlation test potency and degree of serial correlation (outcomes shall be independent from the previous game); and

(x) Test on subsequences.

(c) *Unpredictability.* (1) It shall not be feasible to predict future outputs of an RNG, even if the algorithm and the past sequence of outputs are known.

(2) Unpredictability shall be ensured by reseeding or by continuously cycling the RNG, and by providing a sufficient number of RNG states for the applications supported.

(3) Re-seeding may be used where the re-seeding input is at least as statistically random as, and independent of, the output of the RNG being re-seeded.

(d) *Non-repeatability.* The RNG shall not be initialized to reproduce the same

output stream that it has produced before, nor shall any two instances of an RNG produce the same stream as each other. This property shall be ensured by initial seeding that comes from:

- (1) A source of "true" randomness, such as a hardware random noise generator; or
- (2) A combination of timestamps, parameters unique to a Class II gaming system, previous RNG outputs, or other, similar method.

(e) *General requirements.* (1) Software that calls an RNG to derive game outcome events shall immediately use the output returned in accordance with the game rules.

(2) The use of multiple RNGs is permitted as long as they operate in accordance with this section.

(3) RNG outputs shall not be arbitrarily discarded or selected.

(4) Where a sequence of outputs is required, the whole of the sequence in the order generated shall be used in accordance with the game rules.

(5) The Class II gaming system shall neither adjust the RNG process or game outcomes based on the history of prizes obtained in previous games nor make any reflexive or secondary decision that affects the results shown to the player or game outcome. Nothing in this paragraph shall prohibit the use of entertaining displays.

(f) *Scaling algorithms and scaled numbers.* An RNG that provides output scaled to given ranges shall:

(1) Be independent and uniform over the range;

(2) Provide numbers scaled to the ranges required by game rules, and notwithstanding the requirements of paragraph (e)(3) of this section, may discard numbers that do not map uniformly onto the required range but shall use the first number in sequence that does map correctly to the range;

(3) Be capable of producing every possible outcome of a game according to its rules; and

(4) Use an unbiased algorithm. A scaling algorithm is considered to be unbiased if the measured bias is no greater than 1 in 100 million.

**§ 547.15 What are the minimum technical standards for electronic data communications between system components?**

This section provides minimum standards for electronic data communications with gaming equipment or components used with Class II gaming systems.

(a) *Sensitive data.* Communication of sensitive data shall be secure from eavesdropping, access, tampering, intrusion or alteration unauthorized by

the tribal gaming regulatory authority. Sensitive data shall include, but not be limited to:

- (1) RNG seeds and outcomes;
- (2) Encryption keys, where the implementation chosen requires transmission of keys;
- (3) PINs;
- (4) Passwords;
- (5) Financial instrument transactions;
- (6) Transfers of funds;
- (7) Player tracking information;
- (8) Download Packages; and
- (9) Any information that affects game outcome.

(b) *Wireless communications.* (1) Wireless access points shall not be accessible to the general public.

(2) Open or unsecured wireless communications are prohibited.

(3) Wireless communications shall be secured using a methodology that makes eavesdropping, access, tampering, intrusion or alteration impractical. By way of illustration, such methodologies include encryption, frequency hopping, and code division multiplex access (as in cell phone technology).

(c) Methodologies shall be used that will ensure the reliable transfer of data and provide a reasonable ability to detect and act upon any corruption of the data.

(d) Class II gaming systems shall record detectable, unauthorized access or intrusion attempts.

(e) Remote communications shall only be allowed if authorized by the tribal gaming regulatory authority. Class II gaming systems shall have the ability to enable or disable remote access, and the default state shall be set to disabled.

(f) Failure of data communications shall not affect the integrity of critical memory.

(g) The Class II gaming system shall log the establishment, loss, and re-establishment of data communications between sensitive Class II gaming system components.

**§ 547.16 What are the minimum standards for game artwork, glass, and rules?**

This section provides standards for the display of game artwork, the displays on belly or top glass, and the display and disclosure of game rules, whether in physical or electronic form.

(a) *Rules, instructions, and prize schedules, generally.* The following shall at all times be displayed or made readily available to the player upon request:

(1) Game name, rules, and options such as the purchase or wager amount stated clearly and unambiguously;

(2) Denomination;

(3) Instructions for play on, and use of, the player interface, including the functions of all buttons; and

(4) A prize schedule or other explanation, sufficient to allow a player to determine the correctness of all prizes awarded, including;

(i) The range and values obtainable for any variable prize;

(ii) Whether the value of a prize depends on the purchase or wager amount; and

(iii) The means of division of any pari-mutuel prizes; but

(iv) For bingo and games similar to bingo, the prize schedule or other explanation need not state that subsets of winning patterns are not awarded as additional prizes (e.g. five in a row does not also pay three in a row or four in a row), unless there are exceptions, which shall be clearly stated.

(b) *Disclaimers.* The Class II gaming system shall continually display:

(1) "Malfunctions void all prizes and plays" or equivalent; and

(2) "Actual Prizes Determined by Bingo [or other applicable Class II game] Play. Other Displays for Entertainment Only." or equivalent.

**§ 547.17 How does a tribal gaming regulatory authority apply for a variance from these standards?**

(a) *Tribal Gaming Regulatory Authority approval.* (1) A tribal gaming regulatory authority may approve a variance from the requirements of this part if it has determined that the variance will achieve a level of security and integrity sufficient to accomplish the purpose of the standard it is to replace.

(2) For each enumerated standard for which the tribal gaming regulatory authority approves a variance, it shall submit to the Chairman within 30 days, a detailed report, which shall include the following:

(i) An explanation of how the variance achieves a level of security and integrity sufficient to accomplish the purpose of the standard it is to replace; and

(ii) The variance as granted and the record on which it is based.

(3) In the event that the tribal gaming regulatory authority or the tribe's government chooses to submit a variance request directly to the Chairman for joint government to government review, the tribal gaming regulatory authority or tribal government may do so without the approval requirement set forth in paragraph (a) (1) of this section.

(b) *Chairman Review.* (1) The Chairman may approve or object to a variance granted by a tribal gaming regulatory authority.

(2) Any objection by the Chairman shall be in written form with an explanation why the variance as approved by the tribal gaming regulatory authority does not provide a level of security or integrity sufficient to accomplish the purpose of the standard it is to replace.

(3) If the Chairman fails to approve or object in writing within 60 days after the date of receipt of a complete submission, the variance shall be considered approved by the Chairman. The Chairman and the tribal gaming regulatory authority may, by agreement, extend this deadline an additional 60 days.

(4) No variance may be implemented until approved by the tribal gaming regulatory authority pursuant to paragraph (a)(1) of this section or the Chairman has approved pursuant to paragraph (b)(1) of this section.

(c) *Commission Review.* Should the tribal gaming regulatory authority elect to maintain its approval after written objection by the Chairman, the tribal gaming regulatory authority shall be entitled to an appeal to the full Commission in accordance with the following process:

(1) Within 60 days of receiving an objection, the tribal gaming regulatory authority shall file a written notice of appeal with the Commission that may include a request for an oral hearing or it may request that the matter be decided upon written submissions.

(2) Within 10 days after filing a notice of appeal the tribal gaming regulatory

authority shall file a supplemental statement specifying the reasons why the tribal gaming regulatory authority believes the Chairman's objection should be reviewed, and shall include supporting documentation, if any.

(3) Failure to file an appeal or submit the supplemental statement within the time provided by this section shall result in a waiver of the opportunity for an appeal.

(4) If an oral hearing is requested it shall take place within 30 days of the notice of appeal and a record shall be made.

(5) If the tribal gaming regulatory authority requests that the appeal be decided on the basis of written submission, the Commission shall issue a written decision within 30 days of receiving the supplemental statement.

(6) The Commission shall uphold the objection of the Chairman, only if, upon de novo review of the record upon which the Chairman's decision is based, the Commission determines that the variance approved by the tribal gaming regulatory authority does not achieve a level of security and integrity sufficient to accomplish the purpose of the standard it is to replace.

(7) The Commission shall issue a decision within 30 days of the oral hearing unless the tribal gaming regulatory authority elects to provide the Commission additional time, not to exceed an additional 30 days, to issue a decision. In the absence of a decision by the Commission within the time provided, the decision of the tribal gaming regulatory authority shall be deemed affirmed.

(8) The Commission's decision shall constitute final agency action.

Dated: September 24, 2008.

**Philip N. Hogen,**

*Chairman.*

**Norman H. DesRosiers,**

*Vice Chairman.*

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