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July 31, 2012

VIA E-mail to [reg.review@nigc.gov](mailto:reg.review@nigc.gov)

Tracie Stevens, Chairwoman  
National Indian Gaming Commission  
1441 L. Street N.W., Suite 9100  
Washington DC 20005

RE: Comments on Proposed Rule 25 C.F.R. Part 543  
Minimal Internal Control Standards for Patron Deposit Accounts and  
Cashless Systems

Dear Chairwoman Stevens:

Please accept the following comments in response to the request for comments on the proposed Rule 25 C.F.R. Part 543 by the National Indian Gaming Commission. This letter follows up on the questions I asked the Commission's legal staff during the July 12, 2012 Regulatory Review Tribal Consultation held at Cache Creek Casino Resort in Brooks, California.

Specifically, I inquired whether Indian tribes located in California would have to comply with the provisions of the proposed rule found at 25 C.F.R. § 543.14 with regard to their potential participation in state regulated intrastate-internet poker. I also inquired whether the Commission believed that state regulated intrastate-internet poker constitutes class II gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq.

The Proposed Rule – Section 543.14

Section 543.14 of the proposed rules provides that in order to establish a patron deposit account, a patron "must appear at the gaming operation in person," at a designated area of accountability, and present valid government issued picture identification. An agent "must examine" the patron's identification and record certain information. The patron "must sign" the account documentation before the agent may activate the account. Additionally, section 543.14 provides that supervision "must be provided as needed for patron deposit accounts and cashless systems by an agent(s) with authority equal to or greater than those being supervised." Section 543.14 also provides that prior to the patron making a deposit or a withdrawal from a patron deposit account, the agent or cashless system must verify the patron deposit account, the patron identity, and availability of funds. Furthermore, section 543.14 provides that adjustments made to the patron deposit accounts "must be performed by an agent," and when a deposit, withdrawal, or adjustment is processed by an agent, certain information must be recorded, including "the

patron's signature for withdrawals unless a secure method of access is utilized." For adjustments, the agent must record "the reasons for the adjustment" and the signature of the agent processing the transaction.

I recognize that the inclusion of controls for patron deposit accounts is important in the prevention of unauthorized access, misappropriation, forgery, theft or fraud via patron deposit accounts and cashless systems. However, as explained below, this rule may have negative implications on tribal gaming facilities that participate in intrastate-internet gaming activities pursuant to state law.

### State Statutes Permitting Intrastate-Internet Gaming

State statutes permitting intrastate-internet gaming are currently being enacted in several states.<sup>1</sup> For example, Nevada has already authorized online poker.<sup>2</sup> Similarly, state officials in California, Iowa, and New Jersey are currently considering whether to allow internet gaming.<sup>3</sup> The ability to establish a patron deposit accounts via the internet is essential to the viability of internet gaming. Thus, state statutes permitting intrastate-internet gaming are likely to allow the creation of such accounts via internet gaming websites.

Indeed, in 2012, a bill was introduced in the California Legislature titled the Internet Gambling Consumer Protection and Public-Private Partnership Act of 2012, S.B. 1463, 2011-2012 Regular Sess. (Cal. 2012). If enacted, S.B. 1463 would permit any entity licensed under state law to offer intrastate-internet gambling to registered online players and establish player accounts "in person, by mail, telephone, or by any electronic means."<sup>4</sup> Thus, a patron would not be required to appear before an agent of the gambling entity to verify their California residency or age.<sup>5</sup> Furthermore, the legislation would permit any licensed entity to provide "a means" for registered internet players to transfer funds into and out of the registered player accounts and the capability to manage and adjust the settings of the patron deposit accounts through the registered, state-licensed internet gambling website.

In other words, these registered player accounts would function as patron deposit accounts that can be managed remotely. However, California's proposed legislation would provide strict safeguards to protect patron's privacy, personal information, and prevent the

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<sup>1</sup> The Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") permits the states to create a regulatory framework to enable intrastate-internet gambling, provided that certain conditions are met. See 31 U.S.C. § 5361. These conditions include the requirement that bets and wagers be made exclusively within a single state, whose laws or regulations comply with applicable federal laws, including the Indian Gaming Regulatory Act of 1998 ("IGRA") (25 U.S.C. 2701 et seq.).

<sup>2</sup> See NEV. REV. STAT. ANN. § 463.016425 (authorizing Internet poker); NV GAM REG 5A.110, 5A.120 (authorizing an operator of interactive gaming to register individuals as authorized players and to create interactive gaming accounts "either remotely or in person").

<sup>3</sup> See, e.g., California Senate Bill 1463 (proposed bill that would authorize Internet poker); Michel Cooper, *As States Weigh Online Gambling, Profit May be Small*, N.Y. TIMES, Jan. 17, 2012, <http://www.nytimes.com/2012/01/18/us/more-states-look-to-legalize-online-gambling.html>; Alexandra Berzon, *Nevada Sets Stage for Online Poker*, WALL ST. J., Dec. 22, 2011, <http://online.wsj.com/article/SB10001424052970203686204577112890018052440.html>.

<sup>4</sup> The Internet Gambling Consumer Protection and Public-Private Partnership Act of 2012, S.B. 1463, 2011-2012 Leg. Sess. § 19990.39 (Cal. 2012).

<sup>5</sup> See e.g., *id.* §§ 19990.47(a); 19990.47(b)-(c); 19990.47(d)-(k); 19990.

unauthorized and unlawful use of internet gambling websites by non-registered players.<sup>6</sup> Similarly, the legislation would provide strict safeguards to ensure that individuals under 21 years of age and whose identity and residency had not been confirmed from engaging in internet gambling activities through state-licensed gambling websites.

#### The Proposed Rule May be in Conflict with State Legislation Permitting Internet Gaming

As discussed above, the ability to establish and manage a patron deposit account via the internet, though within strict guidelines, will likely be a critical component of state legislation permitting internet gaming. Section 543.14, on the other hand, would require a patron to appear at the gaming operation in person and present valid government issued picture identification to establish or manage a patron deposit account.

Additionally, section 543.14 appears to be inconsistent in respect to the level of supervision required for making deposits, withdrawals and adjustments to patron deposit accounts. S.B. 1463 would permit registered players to make withdrawals, deposits and adjust the settings of their patron deposit accounts over the internet, through the licensed gambling website. Section 543.14, however, would require, among other things, that when an agent processes a deposit, withdrawal or adjustment, a record must be created containing the type of transaction, reason for adjustments, identifying information, and the agent's signature. Additionally, adjustments made to the patron deposit accounts must be performed by an agent. In the case of withdrawals, the record must contain the patron's signature, unless a secured method of access is utilized. Under S.B. 1463, software on the secured gambling website would perform these functions without this level of supervision.

Section 543.14 does not provide a waiver or other mechanism for those tribal gaming facilities engaged in online gaming activities under state law to comply with its requirements. Also, Section 543.14 does not clarify whether internet players would be required to appear at tribal gaming operations in person and present a valid government issued pictured identification to open a patron deposit account to engage in online gambling activities if authorized by state law. Accordingly, section 543.14 could interfere with any internet gaming to which it is applied.

#### Request that the Commission Amend the Proposed Rule

Due to the potential conflict between the Proposed Rule and state legislation allowing intrastate internet gaming, the Commission may wish to consider amending the proposed rules.

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<sup>6</sup> Under California's proposed legislation, a licensee must register players and establish player accounts prior to playing. *Id.* § 19990.39(a). California's proposed gaming law provides that to register and establish an account, a person must provide a first name and surname, principal residence address, telephone number, social security number, "identification or certification to prove that the person is at least 21 years of age", and a valid e-mail address. *Id.* § 19990.39(d). To verify that the player is at least 21 years, the licensee must attempt to match the name, address, and date of birth provided by the person trying to register to information in a database of individuals 21 years of age or older with reference to an appropriate database of government records. The licensee shall verify that the billing address on the check or credit card offered for payment matches the address listed in the database. *Id.* § 19990.35(c)(2)(A). If the licensee is unable to verify that the person is 21 years of age or older under that process, the licensee would then be required to submit an age-verification kit consisting of an attestation signed by the person that he is at least 21 years of age and a copy of a valid form of government identification. *Id.* § 19990.35(c)(2)(B).

First, it is unclear whether the Proposed Rule would apply to intrastate-internet gaming conducted by Indian tribes. Arguably, the intrastate internet gaming contemplated by the state statutes is not subject to IGRA because the gaming activity would be Class II gaming under the IGRA. Further, such internet gaming may not be subject to IGRA because it would be conducted entirely intrastate. If the Commission believes that intrastate internet gaming is not subject to IGRA, we respectfully requests that the Commission clarify whether the Commission views the proposed Internet Gambling Consumer Protection and Public-Private Partnership Act of 2012 or similar state legislation permitting intrastate internet gambling as a form of state regulated gambling or tribal regulated gambling subject to IGRA.

If the Commission believes that intrastate internet gaming is subject to IGRA, the Commission may wish to consider amending the proposed rules to permit the creation of patron deposit accounts through secure internet gambling websites. The Commission could include language similar to that found in Unlawful Internet Gambling Enforcement Act<sup>7</sup> requiring internet gambling websites must have age and location verification requirements reasonably designed to block access to minors and persons located out of such state; appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with state law; and that the bet or wager must not violate federal law, including the Indian Gaming Regulatory Act.<sup>8</sup>

I appreciate the opportunity to comment on the proposed changes to the Commission's regulations.

Kind regards,

FREDERICKS PEEBLES & MORGAN LLP



Patrick R. Bergin

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<sup>7</sup> Pub. L. No. 109-347, § 802(a), 120 Stat. 1884, 1952, 1961 (2006) (codified at 31 U.S.C. § 5361)

<sup>8</sup> 31 U.S.C.A. § 5362(10)(B)(ii)-(iii).