



Ho-Chunk Nation Gaming Commission

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

January 31, 2007

VIA FACSIMILE (202) 632-0045

The Honorable Phil Hogen, Chairman
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

**Re: Comments on Class II Definitions, Gaming Standards and Technical Standards.
Proposed Regulations set forth in 25 C.F.R. Part 547**

Dear Chairman Hogen:

On behalf of the Ho-Chunk Nation, the Ho-Chunk Nation ("Nation") Gaming Commission writes in order to comment on the Class II regulations proposed by the National Indian Gaming Commission ("NIGC" or "Commission") at 25 C.F.R. 547. The NIGC's proposed regulations concern "Technical Standards for Electronic, Computer, or Other Technologic Aids" used in the play of Class II games.

The Nation extends its appreciation for the opportunity to meet and comment on these regulations on July 17, 2006 in Bloomington, Minnesota. As noted in our prior comments, we are very concerned about the regulations proposed for Class II gaming. Of all tribes in Wisconsin, the Nation stands to lose the most if these regulations go into effect. This was outlined in the "*Potential Economic Impact of Changes to Class II Regulations*" conducted by the Analysis Group at the request of the NIGC. Quite honestly, the Nation's Class II gaming facility ("DeJope") in Madison, Wisconsin would have no compliant machines if the NIGC's regulations go into effect as currently published.

In the background comments of Part 547, it is stated that "The Commission has determined that it is in the best interest of Indian gaming to adopt technical standards..." When the federal agency tasked with the legal obligation to implement the provisions of the IGRA does so by adopting Class II regulations that harm tribal economic development, tribal self-sufficiency, and strong tribal government, it acts contrary to Federal Indian policy. Based on the economic impact study by the Analysis Group, the NIGC cannot claim that these regulations promote tribal economic development for Indian Gaming. Knowingly advancing such an agenda infringes on a Native American Nation's sovereignty, which in the realm of Class II gaming, was meant to be retained by tribes. This point was stressed in Senate Report 555, where it was clearly noted that "tribal jurisdiction over Class II gaming

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has not been previously addressed by Federal statute and thus there has been no divestment or transfer of such inherent tribal government powers by Congress.” S. Report at 11. Add to this the fact that primary jurisdiction over bingo was to remain with tribes and that the IGRA was not to be construed in a manner that abrogated tribal rights.

The NIGC maintains in the comment section under *Purpose and Scope* that “the technical standards seek to provide a means for tribal gaming regulatory authorities and tribal operators to ensure that the integrity of Class II games played with the use of electronic, computer, or other technologic aids, is maintained; that the games and aids are secure; and that the games and aids are fully auditable.” Furthermore, the NIGC states that “The laboratory will provide a written certification and report of its analysis and conclusions to the tribal gaming regulatory authority for its approval or disapproval of the games or aid. The tribal gaming regulatory authority will retain the certification and report as long as the game remains available to the public for play on the casino floor.” These comments bring up several areas of concern.

First, the proposed regulation will require the tribal gaming regulatory authority (TGRA) to approve or disapprove the independent labs certification of the game or aid. This would require the TGRA to be well versed and knowledgeable in the certification process for components of Class II aids; basically requiring an engineering degree. In order to comply with this proposed requirement, the Nation would have to recruit, hire, train and have on staff a full time engineer to review the independent lab’s certification to make a recommendation of approval or disapproval to the TGRA. To not retain an engineer, the TGRA would be negligent in its duties to uphold and comply with the NIGC MICS. This is an unreasonable hardship that the Nation would be forced to endure.

Second, having the TGRA approve or disapprove a laboratory’s certification and maintain the certification report undermines the entire structure and independence of the tribal gaming regulatory authority. The purpose of the independent laboratory is to test the manufacturer’s hardware/software and to provide assurance to the TGRA that the hardware/software meets the required standards. Traditionally, the TGRA establishes and oversees regulatory compliance for the gaming facilities. Additionally, it is standard practice for the Internal Audit department to report directly to the tribal gaming regulatory authority. Having the TGRA, and ultimately the staff of the TGRA, making a management decision by approving or disapproving a labs report eventually leads to the TGRA making the decision as to what games are offered at the gaming facility. A decision that is, and should be, strictly reserved for the gaming facility managers.

The decision of what games to offer, the compliance with the established standards and the maintenance of the approval letters is inherently the responsibility of the facility. The Internal Audit department audits the facilities for compliance with said regulations and reports the findings to the TGRA. With the proposed regulations, the internal auditor would be auditing the decisions made by the TGRA and staff, which they are a part of.

The NIGC MICS 25 CFR Part 542 Sections 542.22(c)(2), 542.32(c)(2) and 542.42(c)(2) require that “The internal audit department shall operate with audit programs, which, at a

minimum, address the MICS. Additionally, the department shall properly document the work performed, the conclusions reached, and the resolution of all exceptions. Institute of Internal Auditors standards are recommended but not required.” The definition of internal audit in Part 542 states that “Internal audit means persons who perform an audit function of a gaming operation that are independent of the department subject to audit. . . . Internal audit activities should be conducted in a manner that permits objective evaluation of areas examined. . . .” The internal auditor cannot remain independent of the department subject to audit if the entity the auditor reports to is making decisions that the internal auditor must evaluate or in some instances assist in the decision making process. The NIGC is forcing the internal audit department to decide which regulation to be compliant with, Parts 542 or 547, and forcing noncompliance with one of the regulations.

The proposed regulation threatens the structure of the TGRA and will question a certified auditor's objectivity and presumption of objectivity, thus, forcing the auditor into choosing compliance with the NIGC or bringing their own ethics into scrutiny by the Institute of Internal Auditors IIA. Furthermore, a Certified Internal Auditor (CIA) is bound by the (IIA) Code of Ethics. The Code of Ethics, Rules of Conduct 2. Objectivity Internal Auditor: 2.1 states that the internal auditor; “Shall not participate in any activity or relationship that may impair or be presumed to impair their unbiased assessment.” Additionally, the International Standards for the Professional Practice of Internal Auditing; Attribute Standard 1130.A.1 (Assurance Engagements) states that; “internal auditors should refrain from assessing specific operations for which they were previously responsible. Objectivity is presumed to be impaired if an internal auditor provides assurance services for an activity for which the internal auditor had responsibility within the previous year.” A breach of the Code of Ethics can lead to disciplinary action by the IIA, thus threatening the auditor's CIA certificate.

We have decided not to comment on each section individually, quite honestly, because we do not have the technical knowledge or the expertise to determine if a specific technological requirement is realistic. However, in a general observation of the content and text of the document the definitions should clearly identify the meaning of the word, without referring to section within the document help define it. Also, the definitions should not include regulations; this should be contained in the text of the document, so as not to be overlooked by the reader. Additionally, the document is not consistent in the use of its terms, for example, it refers to the client station and electronic player station interchangeably. The above general observations make it confusing and difficult for a reader not well versed in the technologic language to follow and fully comprehend the document.

Traditionally, the Tribes may have used the NIGC MICS as a starting point for developing their own internal controls. This document does not provide internal controls by which an entity protects its assets and encourages adherence to laws and regulations, but instead, dictates technical standards developed by a non-regulatory party. The unintended consequences of incorporating these standards into the NIGC MICS will be to dissuade the Tribes from using the MICS as a resource.

On numerous occasions our staff has turned to the NIGC for clarification and assistance in interpreting the MICS and for guidance on how to comply with specific requirements. Quite

frankly, we do not receive the level of support consistently conveyed by the NIGC. If a response is received, it is usually vague and does not adequately address our inquiry. The NIGC has not demonstrated sufficient support for their existing regulations that have been in effect since January 5, 1999. Considering the insufficient level of support currently provided by the NIGC, we have little belief that they can offer assistance and support for this proposed technical regulation since they had to commission its draft by an outside entity. We have posed the question to NIGC auditors as to how they intend to audit to the proposed technical and game classification standards and the proposed Class II definitions. To date, we have not received an answer. This reiterates our opinion that the NIGC will not be able to provide the technical assistance the Nation will require to understand and comply with the proposed regulations.

The litmus test for identifying Class II gaming machines should be simply stated in the regulations, so that advances in technology will never be inhibited by obsolete technical standards. We respectfully suggest that the technical standards be published in bulletin form, which will allow the NIGC to accommodate new technologies. We also suggest that the bulletin recommend that the TGRA adopt a reputable independent testing laboratory's Class II testing standards. Additionally, the Nation would require that Class II gaming machines and Class II systems be certified by an independent laboratory, in accordance with the testing standards adopted by the Nation.

In closing, the proposed document undermines the basic purpose of the IGRA, which the NIGC is tasked with enforcing. As noted in the economic impact study, the proposed regulation does not illustrate any benefit to the Tribes, places the Tribes in jeopardy of losing their existing Class II facilities, forces them to absorb unforeseen regulatory costs, and surrenders their regulatory sovereignty. This is unacceptable.

We would like to thank the Commission for the opportunity to comment on the proposed regulations concerning "Technical Standards for Electronic, Computer, or Other Technologic Aids" used in the play of Class II games. We further reserve the right to comment on republished Class II gaming regulations. The livelihood of our Nation, tribal members and employees will be affected by your upcoming decision. We trust the Commission will not make this decision without due consideration of the Nation's comments.

Respectfully,



Sharon Whitebear, Chairperson
Ho-Chunk Nation Gaming Commission

Cc: George Lewis, President
Wade Blackdeer, Vice President
Sheila Corbine, Attorney General
Tina Topping, Acting Executive Director of Business
File-JAN085 Class II Comments