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November 12, 2017

Jonodev Chaudhuri, Chairman  
National Indian Gaming Commission  
1849 C Street Northwest  
Washington, D.C. 20240

*Via Electronic & U.S. Mail*

ATTN: 547.5\_Comments@nigc.gov

Re: Proposed Rule, 82 Fed. Reg. 45228-45233 (September 28, 2017)  
Amending 25 C.F.R. 547.5  
2008 Class II Gaming Systems

Dear Chairman Chaudhuri:

The Oklahoma Tribal Gaming Regulators Association (OTGRA) is a professional association of Tribal gaming regulators in the state of Oklahoma. OTGRA's mission is to support and promote knowledge and education in tribal gaming regulation, to share information among its members regarding important regulatory issues, and to provide technical support to its member regulators in order to ensure best regulatory practices under Tribal gaming laws and regulations, the Indian Gaming Regulatory Act, the National Indian Gaming Commission (NIGC) Regulations, and the Oklahoma Tribal Gaming Compacts. In this capacity, OTGRA has been closely engaged with member regulators and the NIGC regarding the status of Class II Gaming Systems that were in operation when the NIGC Technical Standards were implemented, and which have been grandfathered under 25 C.F.R. 547.5 until a sunset of November 10, 2018 (Class II Systems). Specifically, this letter provides comments on the NIGC's Proposed Rule published on September 28, 2017 (82 Fed. Reg. 187, Sept. 28, 2017) (the Proposed Rule) and follows up on and supplements OTGRA's May 10, 2017 letter to you on this topic and its July 26, 2017 letter providing further comment on the Discussion Draft of proposed amendments to the Class II System technical standards that the NIGC issued on June 14, 2017. The NIGC requested that comments on the Proposed Rule be submitted by November 13, 2017.

OTGRA thanks NIGC for the opportunity to comment on the Proposed Rule. The effective regulation of Indian Gaming, and the success of the Indian Gaming industry is best served by the kind of government-to-government consultation that the NIGC has engaged in with the affected Tribes. In furtherance of that consultation, OTGRA offers the following substantive comments on the Proposed Rule.

First, OTGRA welcomes the consolidation of “grandfathering” provisions and the elimination of the sunset provision in Subsection (a) of the Proposed Rule. As the NIGC notes in addressing comments on the Discussion Draft (82 Fed. Reg. 45,229), “the technical standards are intended to ensure the integrity and security of Class II gaming and the accountability of Class II gaming revenues. OTGRA concurs, and observes that eliminating the sunset provision recognizes that, over the 10-year grandfather period, no compliance issues or incidents have been reported. Further, many, if not all, of the Class II Systems in operation today have been subject to system modifications under the provisions of the Class II technical standards, which allow for modifications designed to maintain or to advance the overall compliance and integrity of these systems. So, under the rigorous oversight of our member regulators, the previously-grandfathered Class II Systems have improved their performance and compliance over time. The Proposed Rule, therefore, achieves the intent of the technical standards of “providing a means for TGRA’s and operators to ensure that the integrity and security of Class II games played with technologic aides are maintained and that the games and aids are fully auditable.” 73 Fed. Reg. 60,508, 60,509 (Oct. 10, 2008), while recognizing important role of our member regulators.

The amendment to Subsection (a) also appropriately balances the regulatory performance of these systems and the rigorous regulatory oversight of our member regulators with the enormous potential economic impact of eliminating these systems, which total approximately 24,000 Class II Systems currently in operation, collectively comprising and estimated 41% of total units in play. The Proposed Rule achieves the NIGC’s goal of seeking a “potential alternative that minimizes both the economic impact of the sunset provision and the risk to the gaming operation and the public of systems that are not compliant with the full set of technical standards.” The NIGC states that it “understand[s]...concerns over removing non-compliant Class II Gaming Systems from the gaming floor.” 87 FR 45229. However, OTGRA observes that this response appears not to fully capture the potential adverse impact that would have resulted from removing what have indisputably been *compliant* Class II Gaming Systems from the gaming floor in the absence of any evidence of integrity or performance issues.

With respect to annual audit requirements, OTGRA notes that the Proposed Rule subjects Class II Gaming Systems to compliance auditing that exceeds the industry standards for rolling compliance testing for all other gaming devices by a magnitude of 10. OTGRA believes that this treatment is inconsistent with the NIGC’s determination to remove the “grandfathered” label from Class II Systems and to eliminate the sunset provision, which is a recognition that these Systems are compliant. As our May 10, 2017 and July 26, 2017 comments indicate, OTGRA believes that audit requirements for these systems should be subject to, among other things, a minimum rolling compliance certification of 10% of the electronic layer interfaces in operation at each facility where a Tribe has Class II Gaming Systems in operation. The Proposed Rule’s annual testing and certification of pre-November 10, 2008 Class II Gaming Systems is a significant additional administrative burden imposed on TGRAs, and maintains 547.5 as the only section of the technical standards in which TGRAs are not the primary regulatory of gaming. Nevertheless, OTGRA appreciates the clarification at 547.5(a)(3) that this audit requirement will not apply to Class II gaming systems that TGRAs have determined meet all of the requirements of 547.5, and is confident that OTGRA members will meet this responsibility fully and completely, and will continue to regulate Indian Gaming in Oklahoma with the very highest level of professionalism. OTGRA will, in turn, fulfill its role to assist its member regulators in meeting these requirements through education and information sharing regarding best regulatory practices.

Finally, OTGRA observes that the Proposed Rule continues to hedge on a clear statement that sensitive, confidential and proprietary information should be made available to but not turned over to the NIGC. The NIGC comments that “the Commission agrees that sensitive testing and compliance records should not be disclosed” (82 Fed. Reg. 45230), and that “confidential commercial or financial information and law enforcement information exceptions to FOIA preclude the release of such information.” 82 Fed. Reg. 45231. But, these aspirational statements would be unnecessary if the Proposed Rule made clear that such records are subject to review but not submission to the NIGC. OTGRA hopes that the final rule will provide such clear and certain protection, because experience demonstrates at both the state and federal level that the recipients of such information cannot always protect that information from disclosure once it is included in an agency’s record, irrespective of the recipient’s stated intention to do so.

OTGRA hopes that these comments are helpful to the NIGC and offers them with all due respect and, again, OTGRA offers its thanks to the NIGC for its engagement with Tribal regulators on this important issue. If you have any questions, please feel free to contact me at [Kelly-Myers@Cherokee.org](mailto:Kelly-Myers@Cherokee.org) and/or (918) 207-4914 or OTGRA legal counsel, Joseph F. Halloran at [jhalloran@thejacobsonlawgroup.com](mailto:jhalloran@thejacobsonlawgroup.com) and/or (651) 644-4710.

Respectfully,



Kelly Myers, Chairwoman

cc. OTGRA Board Members  
Joseph F. Halloran