



# Ho-Chunk Nation Department of Justice Compliance Division

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August 3, 2021

RE: National Indian Gaming Commission, Tribal Consultation Series A

Dear Chairman Simermeyer,

After review of the NIGC proposed changes to 25 CFR §502, §522 and §556, I would like to submit the following comments. I recognize that some of my comments may be in the minority, but I feel they should be included nonetheless. Thank you for your consideration in this matter. I have no comments for §537.

The issue of fingerprint submissions was raised during the July 27<sup>th</sup> virtual consultation that I attended. It is understood that NIGC received an audit finding because the FBI considered 25 CFR §502.14 (d) too vague or possibly a determination at the tribal level versus the federal level. When this information was disseminated to the tribes in early 2020, tribe's expressed concerns because they could no longer submit fingerprints through NIGC for tribal gaming commission staff and surveillance personnel or any other person designated under a tribal gaming ordinance. As the Compliance Director for the Ho-Chunk Nation for the past 16 plus years, it is this area that concerns me the most. In addition, NIGC requested comments regarding any impact or unforeseen consequences of the proposed changes. I hope my comments assist NIGC in this respect.

#### 25 CFR §502.14 Key Employee Definition:

1. If I were the FBI, I would reject the proposed changes in §502.14 (a) (11) and (12) because it is no different than language in the current subsection (d) "Any other person designated by the tribe as a key employee." The current and proposed language in these subsections are based on a tribe's discretion, not a mandate established in federal law as required in the FBI CHRI rules. Therefore, a tribe would still not be able to submit CHRI requests for the purpose of licensing tribal gaming commission staff or anyone else who is not directly employed by the gaming operation.
2. With respect to criminal records checks of tribal gaming commission staff for licensing purposes, it is my opinion that licensing is not necessary because these persons perform a tribal governmental regulatory function. The Key Employee definition is based on functions an employee of a gaming operation performs with respect to the conduct of gaming. For clarity, I believe that the phrase "in a gaming operation" should be added to all proposed subsections of §502.14 and not just in §502.14 (d). Again, creating new subsections that gives tribe's discretion to consider persons who maintain custody of gaming records or monitor compliance may not be sufficient to meet FBI requirements.
3. In order to expand the definition of key employee to include individuals who are not direct employees of a gaming operation, the NIGC would need to rename the term to "Key Person". The use of the word "employee" limits the definition to individuals

employed by the gaming operation even if it is not specified. It also raises questions or causes confusion with respect to other “employees” of a tribe who do not work in a gaming operation, such as, I.T., or vendor employees, such as IGT Techs, who might have remote access to gaming software.

4. Why surveillance is currently not in this subsection has always been puzzling to this commenter. NIGC should simply add the surveillance function under §502.14 (a). Surveillance is an integral part of the gaming operation as established under 25 CFR §543 without identifying the supervision or command and control of surveillance personnel.
5. Inserting “irrespective of employment status and compensation” to the definition does not help clarify the definition. If the focus of a key employee remains on the function performed, then there should be no reason to insert additional language about employment status and compensation. Each subsection should be clear enough in its interpretation and intent to stand on its own, this proposed language does not achieve that objective. The inclusion of “catch-all” provisions becomes problematic and should be avoided.
6. NIGC should consider clarifying the definition of “gaming operation” in §502.10 since it is used in §502.14 (d), but not in others. For example; the NIGC approved Ho-Chunk Nation gaming ordinance specifically states that areas such as hospitality, maintenance, food-n-beverage, hotel, etc. are not considered part of the “gaming operation.” This adds clarity regarding who is considered a key employee.
7. As a tertiary issue, the current vagueness of these definitions often raises questions about the scope of NIGC’s and a tribal gaming commission’s authority related to generally accepted non-gaming or ancillary activities associated with gaming. The Ho-Chunk Nation’s January 2021 NIGC compliance visit highlighted a conflict between NIGC’s interpretation of the current §502.14 (b) and the NIGC approved Ho-Chunk Nation gaming ordinance leading to individuals performing non-gaming related ancillary functions, such as food-n-beverage, requiring criminal records checks and licensing as a key employee when they are not performing key employee functions. The increase in the wage to \$100K in the proposed change does not address this issue from a function or scope of regulatory authority standpoint. The recent incident also raises concerns regarding whether NIGC is performing compliance monitoring without regard for the tribe’s right to regulate gaming based on established NIGC approved tribal gaming ordinances.
8. The proposed §502.14 (b) might be too vague because the term “secured areas” is not defined.

#### 25 CFR §502.19 Primary Management Official:

1. NIGC may want to reconsider and delete the proposed subsection (3) “To supervise a Key Employee” from the Primary Management Official definition. If NIGC adopts the proposed language in §502.14 to include a person who is “Custodian of licensing records” or “Compliance inspector or monitor” that would permit tribal gaming commissions to license their staff as key employees, then the NIGC is by default making tribal gaming commissioners Primary Management Officials with the adoption of subsection 502.19 (3). So, why create a conflict whereby a tribal gaming regulator is considered a Primary Management Official? This is contrary to the tribal gaming commission’s purpose and function as gaming regulators and are prohibited from having

any management authority over a gaming operation. This supports my earlier comment in that tribal gaming regulators and their staff should not be considered key employees and should not be subject to licensing. Tribes may feel such licensing is necessary, but it is not. Tribes that currently license tribal regulatory staff have undoubtedly had the conversation of who regulates the regulators. Like the Ho-Chunk Nation, many tribal gaming commissioners are appointed individuals and not subject to licensing, but are held to standards “at least as stringent as” §556 & §558 as an appointed tribal officials. Tribal gaming commission staff can be held to the same standard through normal hiring practices and job descriptions without causing a conflict. The tribe may need to engage the services of a third party to perform a background check.

25 CFR §556.4:

1. Clarity needs to be provided regarding §556.4 (a) (14) “Fingerprints consistent with procedures adopted by a tribe ...” The interpretation of this subsection created concerns and confusion during the Ho-Chunk Nation’s NIGC compliance visit in January 2021 when the NIGC Compliance Officer initially stated that the tribe must have a copy of the FBI fingerprint card in the gaming file based on this provision. After much discussion, the NIGC Compliance Officer reversed his position and did not consider the absence of the FBI fingerprint card as a deficiency. The Ho-Chunk Nation implemented digital fingerprinting back in 2007 and stopped maintaining hard copy fingerprint or digital fingerprint cards because §556.4 (a) (14) only requires a tribe to obtain fingerprints based on the procedures adopted by the tribe. Subsection §556.4 (a) (14) also references §522.2 (h), which also does not mandate the retention of FBI fingerprint cards. To maintain a copy of the procedure for obtaining fingerprints in each applicant file appears unnecessary. See additional comments pertaining to §522.2 below.

25 CFR §522.2 (h):

1. §522.2 (h) in the current and proposed change seems to mandate that tribes use law enforcement agencies to “take fingerprints” and conduct criminal history checks. In reality, many tribes use technology to capture and submit fingerprints as part of the procedures used to conduct their own criminal history checks on applicants through NIGC or their State Justice Departments. In Wisconsin, tribes can take and submit fingerprints directly to the WI DOJ CIB through Badger Net or can use the exclusive third party vendor Fieldprint or use NIGC.
2. The proposed language in §522.2 (b) for a tribe to provide a copy of the procedures to conduct a background investigation should be sufficient and would inevitably include the process for obtaining fingerprint based FBI CHRI requests or NIGC can specifically mention that the FBI requirement must be included in the tribe’s procedure. Subsection §522.2 (h) could then be deleted and §556.4 (a) (14) could be changed to reference §522.2 (b).

Sincerely,  
Joe Buse  
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