



*the*  
**Chickasaw  
Nation**

OFFICE OF THE GAMING COMMISSIONER

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*Bill Anoatubby*  
Governor

*Chris Anoatubby*  
Lt. Governor

February 10, 2022

Mr. Sequoyah Simermeyer, Chairperson  
National Indian Gaming Commission  
1849 C. Street NW  
Mail Stop #1621  
Washington, D.C. 20240


Re: CNOGC Comments on NIGC Series C Consultation Topics

Dear Chairperson Simermeyer & Commission members

Included in with this letter are the Chickasaw Nation Office of the Gaming Commissioner's comments regarding the topics presented for consultation at virtual sessions held on January 11-12, 18, and 25, 2022, particularly regarding the NIGC's consultation topics concerning technological enhancements and technology threats, cyber security, misuse of gaming funds, and the NIGC's contract review process.

Thank you for your consideration of our comments. If you have any questions, please contact me anytime at (580) 310-0570 or [Scott.Colbert@Chickasaw.net](mailto:Scott.Colbert@Chickasaw.net).

Sincerely,

  
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D. Scott Colbert, Commissioner  
The Chickasaw Nation

Enclosure.

Comments of the Chickasaw Nation Office of the Gaming Commissioner  
Consultation Series C  
January 11-12, 18, and 25, 2022

**I. Introduction**

The Chickasaw Nation Office of the Gaming Commissioner (“CNOGC”) is pleased to submit these comments in response to the NIGC’s request for comments in relation to potential changes to its regulations, primarily concerning audit technological enhancements and technology threats, cybersecurity, misuse of gaming funds, and the NIGC’s contract review process. We appreciate the NIGC’s early outreach efforts and the opportunity to provide feedback in advance of the drafting process.

Our comments are organized by topic area and/or question presented below. We look forward to your favorable consideration.

**II. Comments**

**A. Technological Enhancements and Technology Threats (25 CFR Parts 543 and 547)**

1. “In addition to or instead of regulatory requirements, should the NIGC consider other tools such as additional guidance or additional training efforts in order to promote awareness and strengthen cyber security practices?”

While the CNOGC shares NIGC’s concerns about cybersecurity threats at tribal gaming operations, we do not believe that regulations aimed at addressing cybersecurity issues comes within the authority delegated the agency by the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2701 *et seq.* Although we do agree that the NIGC could play a positive role in addressing cybersecurity issues through outreach, training, and education. In our view, the phrase “environment and the public health and safety” (EPHS) as used in the statutory text of IGRA cannot reasonably be read to encompass cybersecurity and related issues. In fact, such concerns were not addressed in IGRA or its legislative history.

When questions arose as to the meaning of the EPHS phrase in 2002, the NIGC published an interpretative rule, giving the Commission a narrow role and recognizing the superior governmental interest of tribal governments in the EPHS arena. We believe that the preamble of the 2002 EPHS rule represents a correct construction of both law and federal Indian policy. On the other hand, continuing to educate and provide training to tribal governments and TGRAs on cybersecurity issues enables the NIGC to disseminate pertinent information on pressing issues as they emerge without the delay associated with a rulemaking to correct stale or obsolete regulations.

The CNOGC recognizes and supports the efforts of the NIGC to provide education and training through the publication of its Tribal Cybersecurity Readiness document and issuing NIGC Tech Alerts. There is more, however, that can be done in this area and we are pleased to offer some suggestions. First, the CNOGC believes that training or instructional videos covering everything from the basics of cybersecurity to more advanced and narrow topics should be easily accessible to all interested individuals on the NIGC’s website. Because the NIGC’s Tribal Cybersecurity Readiness

document outlines common types of cyberattacks, it does a good job of raising awareness for those without a high degree of threat awareness, but it would be a much more effective and useful tool if the agency were to provide more sophisticated on-demand training modules. Currently, the NIGC hosts a limited number of trainings over Zoom on this subject, but there are limits on the efficacy of these efforts. If an interested party wishes to see a particular session, it must send in a request. An on-demand library would allow interested parties to watch these recordings at convenient times. Finally, the NIGC's expertise in cybersecurity is naturally limited because the subject matter does not come within its statutory mission. Accordingly, it will not be able to employ enough subject matter experts on cybersecurity to provide assistance or training to tribal governments at the high levels that may be needed in the wake of a major breach. We recently became aware that the Cybersecurity & Infrastructure Security Agency ("CISA") launched its Tribal Affairs webpage on January 27, 2022. Perhaps a collaboration between the NIGC and CISA on an education and training program would be a valuable endeavor.

Lastly, the CNOGC believes that the NIGC should encourage communication between tribal governments and the NIGC regarding cyber threats rather than remove incentives to candid communications. A prescriptive regulatory approach necessarily entails the threat of punitive enforcement measures. We urge an approach consistent with IGRA's purposes, particularly those aimed at strengthening the capacity of tribal governments to protect their assets. We do not believe that tribal governments must be forced to address cybersecurity concerns. We certainly object to the idea that a data breach would warrant a closure order or civil fine assessment. As the federal government learned in 2020 with the SolarWinds attack, even with the most stringent cybersecurity controls in place, data breaches can happen to even the most sophisticated companies and government agencies.<sup>1</sup>

With regard to the NIGC's IT Vulnerability Assessments, this may be a useful tool for gaming operations that want such service, but we are not clear what such assessments would entail or what goal is served. Moreover, deployment of such programmatic approach would require considerably more staffing than is currently in place. We do not support an increase in the size of the NIGC's staff nor an expansion of its mission in areas beyond the agency's expertise and core statutory mission.

2. "Do existing NIGC requirements create any unintended limits on tribes' ability to implement, regulate, or review new technologies?"

Yes, existing NIGC requirements create limitations to tribal gaming, including adoption of new technologies associated with the emergence of sports betting, digital wallets and mobile gaming. Opportunities to increase remote participation of patrons are somewhat limited for tribal gaming by the current restrictions imposed by the Minimum internal control standards for patron deposit accounts & cashless systems contained within 543.14(b)(i). The current regulation requires the patron to appear in person and present government issued identification to facility personnel to create a valid account with the gaming facility prior to engaging in remote wagering. That requirement limits opportunity for tribal gaming operations to fully utilize new technologies that provide remote identity verification that is quickly becoming standard elsewhere in the industry. An example of the emerging standard of remote identification authentication is demonstrated by rule 5.225, adopted by the Nevada Gaming Control Board ("NGCB"). The NGCB rule implements procedures for remote patron

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<sup>1</sup> See, e.g., <https://www.gao.gov/blog/solarwinds-cyberattack-demands-significant-federal-and-private-sector-response-infographic>.

identification that includes dynamic knowledge-based authentication technology. The CNOGC asks that the Agency consider amending 543.14(b)(i) to provide for tribal gaming utilization of remote authentication technology consistent with industry standards. Proven technologies that maintain integrity, necessary controls, and that would immeasurably broaden participation for tribal gaming should be considered and encouraged by the NIGC. While the CNOGC appreciates NIGC consideration of the impact of current requirements on tribal implementation of new technologies, we strongly urge the Commission to consider additional processes or procedures that provide Agency flexibility to amend regulations to accommodate technological advances such as the remote identification procedures.

3. “What should the NIGC know about the approaches tribal law makers are making with regard to cloud-based storage investments and external vendor services?”

The CNOGC is not of the view that regulatory change concerning cloud-based storage solutions and external vendor(s), is necessary. Certain issues arise when tribal gaming operations are considering these as possibilities for data storage that should be monitored closely by tribal governments and TGRA’s. Most importantly, ownership of the data stored on these cloud-based storage platforms could become a contentious issue between gaming operations and vendors where contract terms are unfavorable. Further, a vendor’s use of and access to such information, both before and after the expiration of a contract, will be a major concern in crafting acceptable service contract.

It might be useful if the NIGC were to publish some form of guidance document similar to what was published regarding sports book agreements, loan documents and financing agreements, and other contracts between gaming operations and vendors.

4. “What changes should the NIGC consider to strengthen cybersecurity for Indian gaming operations?”

As stated in the first framing question to this consultation topic, the CNOGC believes that increased training and education will enhance the capacity of TGRAs to understand both common and novel threats to a gaming operation’s cybersecurity. Further, the NIGC should find ways to increase communication between the Commission and tribal governments regarding actual or attempted cyberattacks without the implied threat of sanctions against an already victimized tribal government.

## **B. Cybersecurity (25 CFR §§ 522.4(b)(7); 573.4(a)(12))**

1. “Should the Agency look to update the EPHS interpretive rule to include the potentially harmful and life altering results of a data privacy breach?”

The CNOGC is generally opposed to the Commission taking regulatory action concerning data breaches, as we are of opinion that the phrase “environment and the public health and safety” as used in the statutory text of IGRA does not extend to issues related to cybersecurity. Per the NIGC’s 2002 EPHS interpretative rule, the Commission itself has espoused a narrow reading of the phrase, finding that the Commission only has the authority thereunder to review plans prepared by tribal governments in relation emergency preparedness, food and water, and construction and maintenance. The CNOGC does not believe that one could reasonably categorize data breaches and the potential results thereof

within any of those categories. Neither does the plain language of the phrase “environment, public health, and safety” call to mind the subject of data privacy. As a result, the CNOGC is concerned that any update to the interpretive rule in this regard would exceed the NIGC’s regulatory authority under IGRA.

Instead, we encourage the NIGC to utilize the resources it would have dedicated to developing such updates to instead provide trainings to assist tribal governments in remaining vigilant as to rapidly evolving threats to data privacy, which trainings could include suggestions and recommendations as to best practices for preventing and responding to data privacy breaches.

2. “What should the Agency’s role be in promulgating standards and requirements for cybersecurity, and does that intersect with the Agency’s existing role of ensuring public health and safety?”

The CNOGC does not see any regulatory role within the authority granted the NIGC pursuant to IGRA pertaining to cybersecurity, and especially not under the umbrella of environment, public health, and safety. To stretch the term public health and safety to encompass cybersecurity would take statutory construction to a whole new level. While NIGC concerns about cybersecurity are understandable, perhaps even laudable, an agency must remain dedicated to its core regulatory mission. The NIGC must resist paternalistic impulses and refrain from efforts to expand its authority into areas not contemplated by IGRA, such as cybersecurity.

3. “What existing cybersecurity considerations are informing tribal lawmakers’ decisions in this area?”

Like many other industries, tribal gaming is increasingly interconnected with electronic and internet-based technologies, and as a result, the basis for regulatory decisions changes as rapidly as the area develops. Among the responsibilities of tribal gaming regulators, as well as tribal information technology personnel working thereunder, is to monitor and respond to the latest cyber security threats, including viruses and other forms of malware that could lead to a security breach. However, in our experience, tribal governments’ considerations are not limited to outside threats, though those may constitute the subjects for which the solutions vary the most greatly. Indeed, it is of central importance for tribal gaming regulators to be aware of and protect against mundane vulnerabilities on internal systems, such as weak passwords and accessible shared files.

As outlined above, tribal governments are the appropriate bodies to address these concerns, as they are empowered under law to promulgate policies, procedures, and regulations best suited to the needs of that tribal government’s regulatory needs and to enforce all such controls. Accordingly, we envision the NIGC’s role in this space to be advisory in nature. As an entity with which most, if not all, tribal governments engaged in gaming interact, we recommend that the NIGC explore methods by which it could disseminate information on, as well as recommended safeguards against, trending and emerging threats on which it has received intelligence.

Moreover, we recommend that the NIGC increase the availability of educational resources that could be utilized by TGRAs as teaching tools for staff. Topics that the CNOGC believes would be especially

helpful include: 1) tips and tactics for personal computer security; 2) methods of monitoring electronic systems for evidence of breach or attempted breach; 3) strategies for protecting patron data and promoting public confidence in data security; 4) effective responses to suspected or confirmed data security breaches; and 5) conducting IT audits.

### **C. Misuse of Net Gaming Funds (25 CFR § 573.4(a))**

1. “Given IGRA’s intent and requirement that the Tribe be the primary beneficiary of its gaming operation, do you view misuses of net gaming revenue as warranting a TCO? Are there circumstances or a level of misuse that you think would warrant a closure order for misuse of net gaming revenue?”

The CNOGC strongly opposes the inclusion of “misuse of gaming revenue” to the list of actions in 25 C.F.R. § 573 (a) that would authorize the Chair, in his or her sole discretion, to issue a temporary closure order to a tribal gaming operation. The term is simply too broad to provide any meaningful standard for establishing appropriate parameters for the exercise of the NIGC’s enforcement authority.

As gaming has unfolded in Oklahoma and throughout the United States since the enactment of IGRA, most reported misuses of gaming revenues were effectuated by identifiable wrongdoers, whose victims include the tribal government and its members. Persons who profit from the conversion, theft, fraud, or misappropriation of tribal gaming funds or assets should be prosecuted under IGRA’s criminal provisions. To file a temporary Closure Order (TCO) against a tribal government and issue a civil fine assessment for the unlawful acts of individuals re-victimizes the victims and could effect irreparable harm.

As Chairman Simermeyer stated during his confirmation hearing before the Senate Committee on Indian Affairs on July 24, 2019, “[f]or many tribal communities and their neighbors, the [gaming] industry represents the lifeblood necessary for community operations, robust engagement with Tribal members and neighboring jurisdictions, and job opportunities for tribal and non-tribal members alike.” This proposal creates the potential for an NIGC Chair to further deprive tribal governments and their citizens of “the lifeblood necessary for community operations.” Further, during a TCO, gaming facilities may have to cease operations entirely for an indeterminate amount of time which will not only deprive tribal governments with funds necessary to pay ongoing debt obligations, but also hinder its ability to fund necessary on-going governmental functions including, to name but a few, law enforcement, housing, healthcare, early childhood and K-12 education, utilities, and services for elders. Considering the NIGC is only currently comprised of the Chair and Vice-Chair, any appeals of a TCO brought under Parts 584 and 585 would largely be performative as it takes a majority vote of the Commission to overturn the Chair’s initial decision.

Additionally, the Letter of Concern and Notice of Violation processes contained in Part 573 are far superior to resolve any issues related to the misuse of gaming revenues. These processes more properly respect the sovereignty of tribal governments as it allows for TGRAs or other Tribal entities with the opportunity to remedy problems through their own internal processes before the NIGC Chair could choose to temporarily close a gaming facility at his or her discretion. Moreover, the list of substantial violations included in 573.4 (a) already authorizes the Chair to issue a TCO should a respondent tribal

government fail to correct violations within the time permitted in an NOV. Thus, the CNOGC opposes this potential regulatory revision.

2. “There are currently 13 substantial violations for which the Chair may issue a TCO. What would be the impact of adding misuse of net gaming revenue to the list of substantial violations?”

As alluded to above, the CNOGC does not believe that “misuse of gaming revenue” should be included in the list of violations that could warrant a TCO as handling these issues in the current Notice of Violation process is more aligned with the NIGC’s mission to ensure compliance with IGRA. The effect of including “misuse of gaming revenue” to 25 C.F.R. § 573.4 (a) would grant the NIGC Chair nearly unbounded authority to enforce an overly-broad standard that will likely be subject to allegations of arbitrary and capricious decision-making, further punish the actual victims of the misuse of gaming revenue, and weaken Tribal sovereignty as it deprives a tribal government the ability to handle its own internal matters within a reasonable amount of time.

Furthermore, the unlawful conversion of net gaming revenue or other criminal acts that would fall under the umbrella of “misuse of net gaming revenue” are best handled by those entities with criminal jurisdiction over such matters. The NIGC’s powers under IGRA are civil in nature, rather than criminal. Accordingly, the NIGC’s regulatory goal is not to punish, but to effect compliance.

#### **D. Providing More Transparency, Accountability, and Efficiency in the NIGC’s Review of Contracts**

1. “What regulatory updates would provide additional transparency, accountability, and efficiency in the NIGC Chair’s contract review and background investigation process?”

Rather than promulgating new regulations, the CNOGC would encourage the NIGC to dedicate its resources to increasing transparency and accountability with regard to existing regulatory structures. Particularly, we believe that tribal governments would more directly benefit from trainings and non-binding, clarifying communications on issues of importance in these areas.

The CNOGC is of the opinion that this approach would be particularly effective in response to contracts concerning emerging areas of gaming. For instance, what are some of the best practices that tribal governments carry out to achieve compliance with existing sole proprietary interest requirements when negotiating revenue sharing agreements for new purposes, such as sports wagering? Or, what factors has the NIGC identified as particularly problematic when backgrounding individuals or entities providing services or equipment related to mobile gaming? Moreover, since the particulars of novel forms and manners of gaming have yet to be fully developed, we believe that promulgating extensive regulation would be premature. Indeed, the NIGC would risk artificially limiting industry growth and innovation by installing standards that, even if reasonable on their face now, may not serve the best interests of tribal governments for the long term. The more prudent approach, in our view, would be to issue regular guidance documents outlining best practices in the context of the current gaming environment. Unlike regulations, which are subject to lengthy development and review processes, such

documents could be quickly updated in light of new information and adjusted to suit the needs of tribal governments.

Should the NIGC determine that it is appropriate to promulgate additional regulations with relation to the NIGC Chair's contract review and background investigation process, though, we would encourage the NIGC to focus its attention to promulgating standards of Agency accountability in this area. For example, 25 C.F.R. §537.4 currently provides that the Chair will "promptly" notify a tribal government if the Chair cannot or will not approve a management contract based on background findings. We believe that setting definitive deadlines for such determinations and communications would increase efficiency, as tribal governments would then have a set timeline on which they could rely for moving forward with an agreement or pursuing other opportunities. by avoiding the potential indefinite waiting period a tribal government must undertake

## 2. "How might technology provide more efficiency and lower cost in this process?"

With regard to these subjects, the CNOGC believes that technology would be best utilized as a tool to facilitate communication, especially with regard to best practices in negotiating management contracts and facilitating background checks of those individuals and entities for which a background check is required under 25 C.F.R. Part 537. For example, the CNOGC believes that the NIGC is ideally suited to host open Round Table Sessions both by video-conferencing technology and in person, which could also be cast and joined by video-conferencing technology, that could serve as a forum between tribal officials on these issues. We envision that such Round Table Sessions could be structured to allow tribal leaders and regulators to share successful strategies and seek advice on stumbling blocks, while the NIGC could provide insight on questions regarding its view on draft contract provisions and investigation techniques. Thereafter, we encourage the NIGC to provide a summary of the findings and conclusions of such Round Tables that would be made available to Tribal leaders and regulators at large.

In a similar vein, the CNOGC believes that it would be effective for the NIGC to make available on-demand training on contracting best-practices and negotiation and backgrounding strategies. We urge the NIGC, though, to ensure that any and all such trainings are 1) easy to locate, 2) viewable on mobile and desktop devices, 3) fully captioned, and 4) accompanied by downloadable content for viewers to follow along. Additionally, we recommend that the NIGC distill the information provided in trainings into non-binding checklists to be used by Tribal leaders as part of a regulatory toolkit.

With regard to how utilizing technology in this way may bring about cost savings, it is our view, as expressed generally herein, that preempting a potential problem is among the most effective ways of increasing Tribal regulatory efficiency, both functionally and monetarily. When the Chair declines to approve a management contract for cause, for example, vital Tribal funds that could have otherwise been dedicated to other purposes must then be expended toward reworking a contract or seeking out a new vendor with which to contract for management responsibilities. Moreover, under such circumstances, the NIGC would then be required to dedicate additional funds from its limited budget to follow-up and respond to the issue at hand.

Currently, the CNOGC perceives that the NIGC has mainly used its authority in a reactive manner—only acting in response to already existing-circumstances. We believe that there is great value in shifting the NIGC's role to instead be proactive, focusing on preempting negative circumstances (i.e., impermissible management contracts or insufficient backgrounding) by setting clear goal lines. We are



of the opinion that this can best be achieved by utilizing technology for communication and training purposes, as outlined above, which would transform the NIGC into not only a regulatory resource but also a hub for information gathering and distribution. This approach would increase the accessibility of proven techniques and knowledge, allowing tribal lawmakers and regulators to achieve their stated purposes more efficiently—furthering the tenets of self-governance as outlined in IGRA without substantially increasing costs or resulting in unnecessary expansion in areas outside the NIGC’s core mission.

### **III. Conclusion**

The CNOGC appreciates the opportunity to provide feedback to the NIGC through the comments herein. We look forward to continuing to engage with the NIGC on these matters, especially as the NIGC develops more concrete rulemaking proposals. We are confident that continued dialogue will help to ensure policies that will benefit the tribal gaming industry and foster economic development in Indian Country.