NATIONAL INDIAN GAMING ASSOCIATION
Rebuilding Communities Through Indian Self-Reliance

June 29, 2017

Via Electronic Mail: Vannice_Doulou@nigc.gov

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW
Mailstop #1621
Washington, DC 20240

Re: Comments on 2017 Consultation Topics

Dear Chairman Chaudhuri:

On behalf of the National Indian Gaming Association, we offer the comments below in response to the National Indian Gaming Commission's ("NIGC") request for comments on the following six consultation topics: (1) draft Class III Minimum Internal Control Standards ("MICS") guidance; (2) rural outreach; (3) development of a strong tribal workforce through training; (4) management contract regulations and procedures; (5) technical standards for mobile gaming devices; and (6) fees provided in Part 514. We appreciate the NIGC's efforts to reach out early and consult with tribal governments before initiating any formal rulemaking procedures and hope our comments prove helpful in both the consultative process and the deliberations that follow.

I. Draft Class III MICS Guidance.

The NIGC is seeking feedback on its proposal to suspend the Class III MICS at 25 C.F.R. Part 542, which would preserve the text of the regulation in the Code of Federal Regulations, but clarify that the regulation is not enforceable by the NIGC. The NIGC is also seeking comments on the draft voluntary, non-binding guidance for Class III MICS dated January 26, 2017.

We understand and do not object to the NIGC's proposal to suspend enforcement of Part 542 and issue an updated version of the Class III MICS as non-binding guidance. Such an approach is not only consistent with the ruling in *CRIT v. NIGC* in which the D.C. Circuit Court of Appeals held that the NIGC lacks the authority to enforce or promulgate Class III gaming regulations, but also accords appropriate deference to tribal regulators in developing their own Class III internal controls and/or applying specific compact provisions. We have some concerns, however, that the draft guidance could introduce a degree of confusion for those mixed-use gaming facilities offering both Class II and Class III gaming, particularly with respect to any additional standards that may be required under their respective compacts.

For instance, it is unclear whether and how the draft guidance will be applied to NIGC audits moving forward. Most of the changes in the draft guidance are intended to harmonize the control standards in Parts 542 and 543 by creating a uniform set of standards for mixed-use facilities to follow. These changes beg the question as to whether the NIGC will similarly adopt uniform audit checklists for both Class II and Class III gaming and, if so, whether a mixed-use facility could be subject to an audit finding

for an exception that only touches a Class III gaming activity. Since audits are typically conducted for the whole gaming facility, there may be some confusion when parsing out any compliance issues and findings based on binding vs. non-binding control standards for Class II and Class II gaming, respectively.

We are also concerned that the draft guidance leaves open the potential for conflict with any internal control standards required under a tribe's compact. Since the draft guidance will not be binding or enforceable, the conflict provisions in the current 25 C.F.R. § 542.4 would no longer be applicable, thereby making it unclear which standard is to prevail in the event of a conflict. This could result in some confusion for those mixed-use gaming facilities that will have to navigate between non-binding guidance and compact standards in operating, regulating, and auditing their Class III gaming activities.

To address these and related concerns, we recommend establishing a tribal advisory committee to identify the impacts of any unintended consequences that may result from the NIGC's proposal for the Class III MICS. The committee would help bring to light any unidentified issues with the NIGC's proposal and propose solutions for ensuring a positive and smooth transition.

We also recommend instituting a more formal rulemaking process before finalizing the draft guidance on the Class III MICS. This could happen concurrently with the publication of the NIGC's proposal to suspend 25 C.F.R. Part 542 and draw on the findings and recommendations from the tribal advisory committee. Given the far-reaching implications of this proposal, it is critical that the NIGC seize very opportunity – whether informal or formal – for tribal participation and input.

II. Rural Outreach.

The NIGC is seeking comments on its initiative to increase its communications and enhance its regulatory partnerships with smaller, rural gaming operations. As part of this initiative, the NIGC is seeking to create a new regional office in Rapid City, South Dakota, to cover the four states (Montana, Wyoming, North Dakota, and South Dakota) that are currently part of the St. Paul region. The new regional office would replace the satellite office in Rapid City, which was opened in 2003 to assist the St. Paul regional office in reaching the tribes in these four states.

While we support the NIGC's efforts to provide better assistance and training to smaller, rural gaming tribes, we do not believe that the creation of a new regional office is necessary to achieve this objective. During its consultation, the NIGC noted that the current St. Paul region is relatively large and that a new regional office may be necessary to ensure sufficient coverage of the facilities in the plains region. It was further noted that a new regional office would be helpful for a number of administrative reasons, including enhanced coordination between the region and the Office of General Counsel at NIGC headquarters.

In our view, the costs of this proposal would far outweigh any potential benefits to the affected tribes. The benefits noted by the NIGC seem to be more administrative in nature and aimed at increasing efficiencies and coordination between the regional and headquarters staff. We question whether this is a sufficient justification to support the significant costs involved in elevating the Rapid City satellite office, which would require hiring a new regional director as well as additional administrative staff to support the new office. We also question whether a compelling need for greater coverage may even exist given that many of the affected tribes, including those in South Dakota, operate under a compact and have limited Class II gaming.

We urge the NIGC to carefully weigh the expected benefits to affected tribes against the costs and determine whether establishing and staffing a new regional office would be the best use of tribal gaming fees.

III. Developing a Strong Tribal Workforce Through Training.

The NIGC is seeking to develop its external training program for tribal gaming regulators and is requesting feedback on ways to provide more targeted training to meet tribal needs.

We welcome and strongly support the NIGC's increased efforts to provide greater training and technical assistance opportunities to tribes, particularly in topics concerning information technology. As technology and gaming products evolve, so do vulnerabilities and the impact of security risks. The NIGC has responded accordingly by taking steps to expand training on information technology issues and develop new assessment tools for identifying potential security threats. We are encouraged by the NIGC's efforts to adapt its training programs to meet the evolving needs of tribal regulators.

As the NIGC continues this important work, we ask that it bear in mind the varying levels of skill and resources across Indian Country and tailor its training offerings to accommodate this wide range of circumstances. This is especially important for trainings on network security and other information technology issues, the impact of which can vary widely depending on the size, scale, and staffing levels of the gaming operation.

In addition, we encourage the NIGC to develop a cross-training program that promotes the exchange of information, insights, and perspectives between tribal regulators and the NIGC. Tribal regulators are on the front line of regulation and are responsible for the day-to-day implementation and enforcement of the policies and regulations developed by the NIGC. Often times, there can be a disconnect between what is perceived by policymakers to be a regulatory concern and the reality of what is actually taking place. A cross-training program that includes site visits by NIGC staff from various departments and regions would give participants a firsthand look at the unique challenges and dynamics of on-site regulation. This would, in turn, enable NIGC staff to make better and more informed decisions regarding the actual needs and demands of tribal gaming regulation.

IV. Management Contract Regulations and Procedures.

The NIGC is seeking recommendations on how the management contract and background investigation regulations at 25 C.F.R. Parts 531. 533, 535, and 537 can be improved. Specifically, the NIGC is seeking input from tribes on how it can improve its efficiency in processing management contracts and background investigations.

As an initial matter, we note that it is somewhat difficult to provide meaningful recommendations given our limited understanding of the NIGC's internal processes for reviewing and approving management contracts. It is our understanding that each management contract undergoes review by both the finance and general counsel's offices, and that the content review and background investigation processes typically happen simultaneously. Beyond that and the basic criteria specified in the NIGC regulations, however, it is not clear exactly what considerations are involved in determining whether to approve a management contract.

This lack of transparency has led to frustration over the approval process, which can take anywhere from six months to several years to complete. In fact, an argument could be made that the recent rise of

gamesmanship issues are attributable, at least in part, to parties seeking to avoid the uncertainties and delays associated with the management contract approval process.

In our view, a major part of the problem is the lack of guidance on the factors considered by the NIGC in determining whether a contract submission is complete in accordance with 25 C.F.R. Part 533. For example, we understand that the financial terms in particular are subject to heightened scrutiny to ensure that the contract does not violate the tribe's sole proprietary interest in its gaming activities. However, there is no guidance to help tribes understand the type of contract terms and conditions that will be viewed as constituting an impermissible financial arrangement.

One way of addressing this problem would be to provide clear examples of contract language and provisions that will likely be viewed as non-compliant with the NIGC's standards for management contracts. This could be accomplished through the publication of Bulletins or other guidance documents. To the extent possible, the NIGC should draw clear lines and provide examples that make clear the type of relationships and financial arrangements that will be deemed impermissible under federal standards. This would help prevent future submitters from including similarly fatal provisions in their contracts and avoid any delays that would have otherwise occurred.

In addition, the NIGC should consider establishing timeframes for the extensive vetting process that each management contract must undergo before it reaches the Chairman for decision. Experience has shown that delays typically occur during the initial review period in which the NIGC staff must determine whether the submission is complete in accordance with 25 C.F.R. Part 533. Since the Chairman's 180-day timeframe for taking action on a management contract cannot begin until this determination has been made, this initial review period is a critical step of the process that can dictate how long the approval process will ultimately take. Establishing a timeframe within which the NIGC must respond to the initial and any subsequent submissions would bring greater certainty and predictability to the overall process.

We understand that some of the delays in the review process may be caused by a lack of adequate staff and/or resources to handle the volume and complexity of management contract reviews. Many of the management contracts submitted for review involve complex financing arrangements that require specialized knowledge of financial products and their liability and risk implications. Hiring additional staff with the expertise necessary to review and analyze complex financial transactional documents could help expedite the review process and alleviate the delays associated with the review process. In fact, we believe this may well be a better use of the resources that Indian Country provides to the NIGC than the above-referenced proposal to establish and staff a new regional office.

V. Technical Standards for Mobile Gaming Devices.

On January 26, 2017, the NIGC issued draft language to amend 25 C.F.R. Part 547 by adding new technical standards for wireless gaming systems and communications between mobile communication devices and mobile gaming systems. We understand that the proposed new standards will not authorize internet gaming and are solely intended to regulate handheld mobile devices used on tribal lands.

While we understand the NIGC's interest in ensuring the security of mobile gaming, we have serious concerns with this proposal to open up and amend Part 547 to include this particular type of gaming technology, especially given that 25 C.F.R. § 547.15 already addresses the requisite standards for wireless security and communication. The NIGC has previously indicated that this new regulation will enable the NIGC to "stay ahead of the technology curve." However, if that is in fact the desired

outcome driving this proposal, we believe the more viable and sustainable approach would be to issue these technical standards as guidance instead of a regulation.

As the NIGC is aware, gaming and network security technologies are constantly evolving and adapting to the changing conditions of the gaming environment. Our concern is that by locking in these proposed technical standards as a regulation, the NIGC may inadvertently impede a tribe's ability to take advantage of new technologies and innovations. Regulations, by nature, are inflexible in that they cannot respond to changes in technology and the gaming environment, and can quickly become outdated as a result. Given the rapid rate of innovations in this arena, it is virtually impossible to draft regulations governing electronic technologies that will remain current and keep pace with changes in the gaming environment.

If the NIGC wishes to stay ahead of the technology curve, we strongly urge the NIGC to revise its approach by withdrawing the proposed draft and issuing the new technical standards through guidance documents that are readily changeable and can easily be adapted to respond to an ever-changing technology curve. This would provide tribes the flexibility needed to integrate and adapt to new technologies without significant delay.

VI. Fees.

The NIGC is considering amending the time period stated in 25 C.F.R. Part 514 for setting and announcing the annual fee rate. Under the current regulation, a preliminary fee rate is adopted by March 1st and a final fee rate is announced by June 1st of every year. The NIGC is proposing to adopt a new schedule in which the fee rate will be announced just once a year on November 1st. One of the stated benefits of adopting a later fee rate announcement date of November 1st is that it will coincide with the completion of the NIGC's budget for the next fiscal year.

If the NIGC decides to move forward with this proposed change, it should bear in mind that some gaming operations operate on a calendar year while others may operate on a fiscal year ending September 30 or possibly June 30. The regulatory text should provide for a smooth transition in the first year the rule goes into effect to avoid confusion. It may help to clarify that in the first year, the previous year's fee rate will carry over until November 1st. Finally, we urge that the regulation should make clear that in the event of an underpayment, the gaming operation may adjust prior payments in the next quarter to comply with fee rate established for that year.

VII. Conclusion

In closing, we would like to reiterate our appreciation for this opportunity to provide the above comments on the consultation topics under consideration by the NIGC. We look forward to working with the NIGC as these proposals are developed further. Please do not hesitate to contact us if we can provide any additional information.

Sincerely,

Ernest L. Stevens, Jr.
Chairman