



January 13, 2011

Ms. Tracy Stevens, Chairwoman  
National Indian Gaming Commission  
1441 I St. NW, Ste. 9100  
Washington, DC 20005

VIA Email: [reg.review@nigc.gov](mailto:reg.review@nigc.gov)

Re: Notice of Inquiry - Comments on Regulations  
to implement IGRA

Dear Chairwoman Stephens:

We are pleased to have the opportunity to comment on the regulations to implement the Indian Gaming Regulatory Act. Our firm works extensively with many tribal casinos and our comments are from an accounting perspective developed through much "hands-on" experience.

The comments are a summary from our management and staff. If you have any questions or would like to discuss any items further, please contact Rachel Loudon, [rachell@finley-cook.com](mailto:rachell@finley-cook.com)

Sincerely,

A handwritten signature in blue ink that reads "Donald W. Orr".

Donald W. Orr  
Partner

MICS Section	Proposed Change or Question	Finley & Cook Comments
CFR 25 Part 502	<p>Net Revenues</p> <p>Should the Commission consider further defining "Net Revenues-Management Fee"?</p>	<p>Clarification would be helpful. Depending on the way the casino is organized, it may have a statement of revenues, expenses and changes in fund balance, not an income statement. Since the captions on the statements differ, it may be confusing to tribal leaders and accountants when trying to apply the definition as it stands. Distributions to the tribe are subtracted from revenues to arrive at the bottom line "change in Fund Balance", but are not on an traditional income statement.</p>
CFR 25 Part 502	<p>Net Revenue Allowable Uses</p> <p>Should the Commission consider further defining "Net Revenues-Allowable Uses" to be based on cash flow? For example, should the new definition be "Cash Flow" equals "Net Income plus depreciation minus principal loan payments and reserve funding?" The purpose of this would be to consider the overall financial integrity of the gaming operation before funding other tribal programs.</p>	<p>Rather than focusing on "allowable uses" the real emphasis should be on "allowable distributions." The cash flow issue is a good point and would likely be beneficial for many tribal leaders to help them understand that \$1,000,000 in net income isn't necessarily \$1,000,000 in distributable funds. Illustrating that funds to maintain operations, make debt payments, capital asset purchase, as well as, adjusting accrual basis financial results to cash basis would be helpful. We believe there is a related issue that creates conflict between casino management and tribal leaders when the casino is called upon to make payments to tribal members for things that are not related to the operation of the casino or when the casino is expected to make payments on behalf of the tribe. If the tribe has an approved Revenue Allocation Plan, such payments are likely in violation of the Plan. Emphasis should be placed on ALL payments to the tribe and tribal members that are not a part of the normal operations of casinos.</p>
CFR 25 Part 502	<p>Management Contract</p> <p>Should the definition of management contract be expanded to include any contract, such as slot lease agreements, that pays a fee based on a percentage of gaming revenues?</p>	<p>The definition of management contracts should not be expanded to include contracts based on a percent of gaming revenues. Contracts should be evaluated on the basis of what the contract itself provides. Gaming machine vendors generally do not manage the casino's operation, but merely provide games. The revenue sharing arrangements have allowed many tribes to operate casinos without having to come up with the capital necessary to purchase the machines. If the definition of management contracts were extended to slot lease agreements we believe the number of vendors offering games to casinos would decline due to the extensive management contract approval process. We believe that those vendors who were willing to go through the approval process could want more say in the operations of the casino's floor. Neither result would be desirable in my opinion.</p>
CFR 25 Part 502	<p>Management Contract Acceptable Compensation</p> <p>Should there be a definition regarding acceptable compensation to a manager contractor?</p>	<p>Depending on where a casino is in its life cycle it is understandable that a developer might receive more cash than the tribe. As with the development of any business, the developers and lenders are likely to receive the lion's share of the cash flow in the beginning periods. We think this fact is not really highlighted to most tribal leaders. They expect faster returns than are practical in many instances given the method of financing and development. That being said, the types of reimbursement and compensation should be defined and, to the extent practical, upper limits set as it is with management fees themselves.</p>

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CFR 25 Part 514	<p>NIGC Fee Calculation</p> <p>Should the calculation of NIGC fees be changed to "fiscal" year rather than "calendar" year for calculation? If this revision is helpful, what is the best method for implementation? Should they provide for 18 months for transition? How would the commission set dates for payment due dates as tribes have different fiscal years?</p>	<p>Calculating the fee on an calendar year basis is not overly onerous on casinos who have fiscal year ends that differ. Casino's must track and report W-2g, 1099 and W-2s on a calendar year basis. If the casino has adequate accounting systems and processes, the difference is not really burdensome.</p>
CFR 25 Part 514	<p>Gross Gaming Revenue Definition</p> <p>Should the Commission define gross gaming revenue to be consistent with GAAP definition of the term? Would this make fee calculation easier?</p>	<p>In practice, some CPAs apply the definition of gross gaming revenues differently than others. A clear definition from the NIGC helps insure consistent calculation of the fees due.</p>
CFR 25 Part 514	<p>Should this section be revised to include fingerprint processing fees? Should it specify that fee collected from the gaming tribes for processing fingerprints with the FBI are included in the total revenue collected by the Commission that is subject to statutory limitation? Should the Commission include a requirement for it to review fingerprint processing costs on an annual basis and, if necessary, adjust the fingerprint processing fee accordingly?</p>	<p>We believe that most fingerprint fees are paid by gaming commissions, not casinos so the fees should be kept separate. We believe that a requirement to adjust for current processing fee's is reasonable and this language should be inserted.</p>
CFR 25 Part 514	<p>Late Payment System</p> <p>Should the Commission consider a late payment system in lieu of a Notice of Violation for submitting late fees? As an NOV could lead to closure of a gaming facility, the Commission questions whether an NOV is an appropriate response to a late fee submittal caused by a change in employees or other minor issue? Should the Commission consider adding a type of "ticket" system to part 514 so that an NOV would only be issued in instances of gross negligence or wanton behavior, or in a dollar amount that allowed the tribe to reap an economic benefit from is failure to pay in a timely manner.</p>	<p>We wholeheartedly agree that a better process is needed. While collection of the fees are vital to the Commission's operation, the threat of closure for untimely payment of an amount that is inconsequential to each casino seems out of place. A ticketing or progressive step system of penalties seems like a more appropriate solution.</p>
CFR 25 Part 518	<p>Self Regulation</p> <p>Should the Commission revise part 518, Self Regulation of Class II gaming? They have been told that this regulation is overly burdensome and that the burden of completing the process to obtain certification outweighs any benefits gained from self regulation.</p>	<p>No comment</p>

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CFR 25 Part 523	<p>Gaming Ordinances</p> <p>Should part 523 be eliminated as being obsolete? The Commission believe that there may not be any such ordinances that have not been submitted.</p>	Yes
CFR 25 Part 531	<p>Collateral Agreements</p> <p>Should the Commission consider whether is has authority to approve collateral agreements to a management contract? Some tribes have asked the Commission to review the contract and collateral agreements to determine if they have a detrimental accumulative effect on the tribe. For example, if the management portion of the contract only requires payment of 5% of the net win, collateral agreements can result in excess of 80% being paid resulting in a loss for the tribe.</p>	It seems appropriate that the NIGC review collateral agreements since the result of a default could create a situation that is either unenforceable or that would require the NIGC license or approve certain actions. The cumulative effect of a management contract and collateral agreement could certainly seem detrimental to the tribe, but each element should be evaluated based on the management and lending aspects of each. As mentioned above, in the early years of a highly leveraged casino development, the lender is likely to receive a majority of the cash flow from the operation depending on the success of the project. Are the terms of the credit arrangement reasonable and consistent with the marketplace.
CFR 25 Part 533	<p>Submission Requirements for Management Contracts</p> <p>Should the commission issue an amendment that would clarify the trustee standard by adding two additional grounds for the possible disapproval of a management contract. If the contract was not submitted in accordance with the submission requirements of part 533, or if the contract does not include the regulatory requirements for approval pursuant to Part 531.</p>	Additional guidance is helpful as long as it doesn't restrict things so narrowly as to remove all judgment. The trustee standard sounds to me like it allows the NIGC to reject agreements on the grounds that a "reasonable person" would not enter into the agreement. That is very broad, but we believe useful as some tribes might be persuaded to enter into agreements that are just not good for them. They may meet all technical standards, but due to various terms or conditions be outside the industry norm.
CFR 25 Part 537	<p>Background Submission for Management Contractor</p> <p>Should the Commission revise part 537 as there has been confusion as to whether a management contractor must submit the Class II background information when the contract only includes class III gaming. IGRA does specify the approval of contracts for both Class II and III as a power of the Chairwoman.</p>	This one is difficult to answer if the NIGC is providing valid information on those submissions then it might be extremely helpful and protective, however from what we understand the information provided by the NIGC is outdated if a response is ever received, the majority of the time, no response is the response. If this is the case then we don't believe this is an effective addition, however if this process could be revised to be more meaningful and the information accurate, then this information would be beneficial to the Tribe.
CFR 25 Part 537	<p>Appeal of NOV</p> <p>Should the Commission consider more comprehensive and detailed procedural rules, especially in areas such as motion practice, that are largely unaddressed by the present rules?</p>	Yes, we do agree that if the NIGC has the authority to make decisions that they must have a clearly outlined process for dispute that protects all parties involved

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CFR 25 Part 542	<p>Class III Minimum Internal Control Standards</p> <p>Should the Class III MICS be struck as suggested? The Commission is seeking comment on whether the Class III MICS has a positive impact on the industry, and, if changed to a guideline (recommended), what, if any, impact might this have on tribal gaming? Many tribal gaming regulatory authorities have relied on the regulation to define the foundation of their minimum internal control standards, others have merely adopted the federal rule verbatim, while others have drafted their own.</p>	<p>Since the MICS are "minimum", we believe that they are helpful to the industry and should remain as required standards. Tribes certainly have the right to have more controls or word things in their own way as long as the goal of each minimum standard is met. In any event the requirement helps to insure that the tribe's assets and interests are protected.</p>
CFR 25 Part 542	<p>Class III Minimum Internal Control Standards</p> <p>Additionally, how would the state compacts that incorporate the Class III MICS be affected?</p>	<p>Speaking only of Oklahoma, the Class III MICS would prevail, however since the Compact is not very specific on the technical requirements and in the compact they have deferred to the MICS when the regulation provides more control we do not believe there would be a significant change.</p>
CFR 25 Part 542	<p>Class III Minimum Internal Control Standards</p> <p>If struck and revised but not placed in to regulation, how should the Commission publish them? A Tribal Advisory Committee? Does it need to be comprised of different members than the Class II MICS TAC? How should the member be selected? What process should the NIGC utilize to make revisions?</p>	<p>A tribal advisory committee should be established and it could initially propose changes to the current proposed draft before it is put out for comment. The Commission could accept nominations from the industry and make selections to get a reasonable cross-section of the industry. Representatives should come from each region and from varying sizes of operations.</p>
CFR 25 Part 542	<p>Class II Minimum Internal Control Standards</p> <p>The process of revising the Class II MICS has been under significant scrutiny and objection. The Commission is dedicated to making revisions using a process that is inclusive of all interested parties. Should tribal gaming regulatory authorities be provided an opportunity to provide comment on the proposed rule before public meetings? Should comment be sought from accounting practitioners?</p>	<p>A process that allowed tribal gaming regulators to comment first would be helpful. They are the ones who will have to enforce the standards and assess compliance. We believe input from the accounting profession would also be helpful. Internal controls are a key element in accounting processes and the majority of transactions and processes within a casino give rise to accounting transactions. Accountants and tribal regulators have different perspectives and the result of the collaboration would be a better product.</p>
CFR 25 Part 542	<p>Class II Minimum Internal Control Standards</p> <p>Should a tribal advisory committee be assembled to provide advice to the NIGC in the administration of the rule once adopted?</p>	<p>A tribal advisory committee would be an excellent aid to the Commission in the administration and creation or revision of this or any standards the Commission issues.</p>
CFR 25 Part 542	<p>Class II Minimum Internal Control Standards</p> <p>How should the Commission process the revisions of the Class II MICS? Should they start with the current proposed draft? Should they establish a tribal advisory committee to participate? How would the members be selected? What will the revision process be?</p>	<p>A tribal advisory committee should be established and it could initially propose changes to the current proposed draft before it is put out for comment. The Commission could accept nominations from the industry and make selections to get a reasonable cross-section of the industry. Representatives should come from each region and from varying sizes of operations.</p>



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CFR 25 Part 547	<p>Minimum Internal Control Standards for Gaming Equipment Used with the Play of Class II Games</p> <p>Should this section be further revised? Should the NIGC start with the current proposed draft? Should they establish a tribal advisory committee? How would the members be selected?</p>	<p>A tribal advisory committee should be established and it could initially propose changes to the current proposed draft before it is put out for comment. The Commission could accept nominations from the industry and make selections to get a reasonable cross-section of the industry. Representatives should come from each region and from varying sizes of operations.</p>
CFR 25 Part 556	<p>Backgrounds and Licensing</p> <p>Should the pilot program be formalized?</p>	<p>It should be formalized and a time established for compliance.</p>
CFR 25 Part 556	<p>Fingerprinting for Vendors, Consultants, and other Non-Employees</p> <p>Should the Commission adopt regulations that would allow tribes to submit fingerprint cards to the Commission for vendors, consultants, and other non-employees?</p>	<p>Since many tribes license vendors and other non-employees it would be beneficial to them for the Commission to process fingerprint cards for such applicants.</p>
CFR 25 Part 559	<p>Facility License Notifications, Renewals, an Submissions</p> <p>Should this part be revised?</p>	<p>We can't think of any major revisions needed it is a cumbersome process but our casinos have complied.</p>
CFR 25 Part 571.1	<p>Records Access</p> <p>Should the Commission revise the regulations to clarify that the access includes access to records at off-site locations including sites maintained by third parties?</p>	<p>It would seem implied that access to all means all no matter where they are located. If some tribes have not understood this, clarification may be warranted. Emphasis of the matter can help serve as a reminder to all.</p>
CFR 25 Part 573	<p>Enforcement</p> <p>Should the Commission promulgate a regulation concerning withdrawal of a NOV after it has been issued? Under what conditions or concerns the NOV could be withdrawn? Would it be withdrawn at the sole discretion of the Chairwoman?</p>	<p>It makes sense to have a mechanism to withdraw an NOV when the facts surrounding the issuance of the NOV are erroneous or when there are mitigating circumstances that change the Commission's view of the matter. The Chair should be the one who would have the discretion to withdraw the NOV since the Chair has the discretion to issue it in the first place.</p>
Potential New Regulations	<p>Tribal Advisory Committee</p> <p>Should the Commission develop a regulation or policy identifying when a tribal advisory committee will be formed to provide input and advice to the NIGC and if so how the members will be selected?</p>	<p>A tribal advisory committee should be established. The advisory committee could provide the NIGC with useful input and perspective on most issue before the NIGC. The Commission could accept nominations from the industry and make selections to get a reasonable cross-section of the industry. Representatives should come from each region and from varying sizes of operations. The number of representatives should be determined based on the size of each market so that all areas are properly represented.</p>

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Potential New Regulations	<p>Sole Proprietary Interest Regulation</p> <p>The IGRA requires that the tribe have sole proprietary interest in the gaming operation. Should the Commission consider a regulation identifying when the sole proprietary interest provision is violated and providing a process whereby at the tribe's request the NIGC will review the documents of agreements and make a determination?</p>	<p>We believe that guidance from the Commission on this issue would be helpful to the tribes and their legal counsels who assist them in drafting agreements. The guidance shouldn't seem so limiting or restrictive as to bar the tribe from contracting with parties to provide goods and services to their casinos when it is the overall best interest of the tribe.</p>
Potential New Regulations	<p>Communication policy or regulation identifying when and how the NIGC communicates with tribes.</p> <p>Should the NIGC develop a regulation or include as part of a regulation a process for determining how it communicates with tribes? The NIGC has a government to government relationship with federally recognized tribes, however, the NIGC staff often communicates primarily with the Gaming Commissions or Tribal Gaming Regulatory Authority. On issues related to broad policy change or compliance issues such as NOV's. How should the NIGC communicate when the tribe and the TGRA are at odds with each other? Should the NIGC consider requiring a resolution from the elected tribal council setting forth which entity communicates with the NIGC? Alternatively, should the NIGC promulgate a regulation or policy establishing a default method of formal communication unless otherwise directed by resolution?</p>	<p>A regulation that sets forth a default method of communication is needed. Often notices are sent to tribal leaders who may not be all that involved in the operation of the casino. These notices may not be forwarded in a timely manner to those who operate and regulate the casino. As a default, if notices or communications were sent simultaneously to tribal leadership, regulators and casino management, this would aid casinos in receiving timely information and would help when the parties are not communicating effectively among themselves. Tribes should certainly be allowed to specify a primary party to deal with the NIGC, but all effected parties should be included in most communications.</p>
Potential New Regulations	<p>Buy Indian Act Regulation</p> <p>The Commission is considering adopting a regulation which would require the NIGC to give preference to qualified Indian-owned businesses when purchasing goods or services as defined by the "Buy Indian Act". The Commission seeks comment on whether this is appropriate?</p>	<p>It certainly seems appropriate that the NIGC would give preference to native american owned businesses for its own purchasing. However, as a regulatory body, the Commission would have to consider whether the potential appearance of conflicts of interest when doing business with Tribes who the Commission also regulates outweighs the benefits of promoting minority owned businesses.</p>
Other Regulations	<p>Part 501 Purpose and Scope, Part 503 Commission Information Collection Requirements under the Paperwork Reduction Act: OMB Control Numbers and Expiration Dates, Part 513 Debt Collection, Part 515 Privacy Act Procedures, Part 517 Freedom of Information Act Procedures, Part 522 Submission of Gaming Ordinance or Resolution, Part 531 Content of Management Contracts, Part 535 Post Approval Procedures, Part 571.8 - 571.11 Subpoenas and Depositions, Part 571.12 - 571.14 Annual Audits, Part 575 Civil Fines</p>	<p>We agree that these areas are not in current need of revision.</p>