

RED FLAGS HANDOUT

Below is a list of Red Flags that may help regulators identify IGRA violations. When one of a combination of these are observed or reported, additional investigation will be needed to determine if there is actually a violation. This is not an exhaustive list and there will be other actions not listed that may can constitute an IGRA violation.

Management w/o approved contract

- Operation managers appear not to be making management decisions or not to have the authority to make decisions. This may be for one part of the gaming or all gaming.
- Are policies and regulations written by outside parties or are approved by 3rd parties before implementation?
- Are 3rd parties present at the casino to consult on issues when not needed or outside agreement?
- Do 3rd parties direct employee activities, directly or indirectly?
- Do 3rd parties maintain close relationship with an elected official(s), or top management?
- Are 3rd parties available to meet with the regulators, or do they disappear when you are on site?
- Do 3rd parties have unescorted access to restricted areas like back of the house, gaming machines, financial information, etc.?
- Is the 3rd party's work consists of tasks that management would typically perform?
- Written documentation between the 3rd party "consultant" and the tribe is non-existent, limited, or off topic.
- The 3rd party is reviewing and approving promotions/marketing.
- Employees and regulators who do not agree with the 3rd party or attempt to regulate the 3rd party are demoted or terminated.
- Operation managers appear not to be making management decisions or not to have the authority to make decisions. This may be for one part of the gaming or all gaming.
- Does the 3rd party have unrestricted access/remote access to your games/gaming system(s) that will allow for changes to be made in relation to payout of the games/gaming system(s).
- Is the 3rd party deciding the payout percentages on your games/gaming systems?
- Is the 3rd party deciding what games will be offered and/or where they will be placed on the floor?
- Is a 3rd party giving final approval of changes to payout percentages, changes of games/gaming system(s) in the tribal facility?
- Does the 3rd party participate in or are they responsible for selecting other vendors at the casino? Including back off house accounting system, insurance, other EGM vendors.
- Does the 3rd party have to agree with management on the decisions above? Consensus is a form of management.

Management w/o approved contract continued:

- Does the 3rd party have control physically or by approval of any of the casino accounts or expense payments?
- Does the manager get a paycheck or a lump sum based on a percentage of revenue?
- If manager receives a bonus based on a percentage of revenue, does their contract list what must be accomplished to achieve the bonus?

SPI

- Most common: are payments to the vendor excessive, based on a percentage of revenue, over a long period of time or indefinite? Vendor may have provided significant services in the beginning, but eventually is doing nothing to receive the payments.
- Does the agreement extend beyond 5 or 7 years or beyond the needs of the tribe?
- Does default of the agreement give the vendor land, buildings, or control over gaming?
- Does the vendor control payout, game placement, game selection?
- Does the agreement give the vendor the majority of the floor space or a high percentage of the revenue from each machine or system?
- Compensation that is out of proportion for work performed and/or is based on a percentage of net win, net gaming revenue or gross gaming revenue.
- 3rd party seldom present at the casino (1 x week, 1 x month, etc.), yet paid significant compensation.
- Previous agreements and contracts handled by multiple parties are consolidated into one party at a higher rate of pay.
- Previous contract rates are greatly increased (x2, x10, x100) for no apparent reason when transferred to a new party.
- Repayment to developer is unlimited or lengthy and based on a percentage of revenues.
- Termination of contract is in favor of vendor or difficult for tribe to terminate.
- Is the vendor paying the tribe game placement fees and retaining substantial control over the machines/systems?

Misuse of Gaming Revenue

- Is there a lack of policies and procedures in procurement and accounting?
- Has the TGRA encountered difficulty in promulgating policy and procedures to protect the gaming operation against fraud both internally and externally?
- Are all gaming revenue sources accounted for in the cage and vault and expensed through the casino accounting procedures?
- Is the casino distributing payments directly to tribal members or individuals under the guise of an undocumented tribal assistance programs or loan program, where there is no expectation of repayment?
- Are there proper policy and procedures in place for the issuance of complimentary, most notably discretionary complimentary. (Who is issuing the comps? Do they have authority within policy to issue (dollar amounts and job titles of issuer)? Who are they issuing the comps too? Are they players, do have any association with vendors, are they issued to decision makers for the gaming facility or tribe?)

Misuse of Gaming Revenue Continued:

- Previous agreements and contracts handled by multiple parties are consolidated into one party at a higher rate of pay.
- Previous contract rates are greatly increased (x2, x10, x100) for no apparent reason when transferred to a new party.
- Fraudulent purchases by casino employee/management.
- Payment of ghost employees.
- Unauthorized write-off of player debt or NSF checks.
- Promotion fraud.
- Misuses of casino charge cards.
- Misuse of complementary services.
- Operating a casino without an approved budget makes misuse harder to track.

Misc. Red Flags

- No one has a copy of the agreement and the CO cannot find anyone who has reviewed it.
- TGRA or Operations attempt to defend the Parties presence and contributions prior to inquiry.
- Attempts to avoid licensing process or is not fully cooperative.
- Contract is overly simple and vague.
- Presents of new gaming machine vendors and product not typically seen in the market or appears to be substandard in performance.

NATIONAL INDIAN GAMING COMMISSION
BULLETIN

No. 94-5

October 14, 1994

**Subject: Approved Management Contracts v. Consulting Agreements
 (Unapproved Management Contracts are Void)**

One of the purposes of the Indian Gaming Regulatory Act (IGRA or Act) is:

to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

25 U.S.C. 2702(2). To carry out this purpose, the Act requires, among other things, the approval of management contracts for the operation and management of Indian gaming operations. 25 U.S.C. 2705(a)(4); 25 U.S.C. 2710 (d)(9); and 25 U.S.C. 2711.

Questions have been raised as to what distinguishes a management contract from a consulting agreement. The answers to these questions depend upon the specific facts of each case. The Commission stands ready to make a decision as to whether or not a particular contract or agreement is a "management contract" under Commission regulations. However, before doing so, the Commission must see the entire document including any collateral agreements and referenced instruments.

The consequences are severe for a manager who mistakes his management agreement for a consulting agreement. Consequently, the Commission offers the following information and observations.

MANAGEMENT CONTRACTS AND OTHER GAMING RELATED CONTRACTS

"Management contract" is defined as:

any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of the gaming operation.

25 CFR § 502.15

NIGC approval of management contracts is required by IGRA as a means of protecting the tribes. A requirement for including within the scope of audit of the gaming operation other contracts, including supply contracts, is similarly a means of protecting the gaming operations and ultimately the tribes from those deemed unsuitable for Indian gaming or on terms at variance with IGRA's requirements. Other gaming-related contracts not providing for management may require the approval of the Secretary of the Interior.

EFFECT OF NON-APPROVAL

A management contract that has not been approved by the Chairman is void. Furthermore, the management of a gaming operation under a "management" contract or agreement that has not been approved could result in the gaming operation being closed. The consequences to the parties are:

- o The tribe would have to close down the operation or operate it on its own, and
- o The management contractor would have to vacate the operation and could be subjected to legal action to return to the tribe any funds it received under the contract.

MANAGEMENT

Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval.

Furthermore, the Congress and the Commission have determined that certain management activities can or should be present in a management contract. The presence of all or part of these activities in a contract with a tribe strongly suggests that the contract or agreement is a management contract requiring Commission approval. Such activities or requirements with respect to the gaming operation include, but are not limited to, the following:

- o Maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis;
- o Access to the gaming operation by appropriate tribal officials;
- o Payment of a minimum guaranteed amount to the tribe;
- o Development and construction costs incurred or financed by a party other than the tribe;

- o Term of contract that establishes an ongoing relationship;
- o Compensation based on percentage fee (performance); and
- o Provision for assignment or subcontracting of responsibilities.

It has been argued that if all of the ultimate decision-making is retained by the owner, the agreement should be construed as a consulting agreement. Some gaming operations are owned by individuals, some by corporations, some by partnerships, some by Indian tribes, etc. Regardless of the form of ownership, the owner always has the ultimate authority when it comes to decision-making. The exercise of such decision-making authority by the tribal council or the board of directors does not mean that an entity or individual reporting to such body is not "managing" all or part of the operation.

CONSULTING CONTRACT

What then is a consulting contract and what regulatory requirements would apply? The answers to such questions must be made on a case-by-case basis because they depend on the facts and circumstances of the individual situation and the actual day-to-day relationship between the tribe and the contractor.

An agreement that identifies finite tasks or assignments to be performed, specifies the dates by which such tasks are to be completed, and provides for compensation based on an hourly or daily rate or a fixed fee, may very well be determined to be a consulting agreement. On the other hand, a contract that does not provide for finite tasks or assignments to be performed, is open-ended as to the dates by which the work is to be completed, and provides for compensation that is not tied to specific work performed is more likely to be construed as a management contract.

Regardless of the specifics of a consulting agreement, advance approval is not required but an advance determination under Bulletin No. 93-3 is strongly recommended to avoid a later decision by the Commission that the agreement is a management contract.

REQUIREMENT FOR DETERMINATION

The Commission recognized early the need to provide guidance on which contracts are subject to approval and therefore issued Bulletin No. 93-3 on July 1, 1993. It provides for the submission of gaming-related contracts and agreements to the NIGC for review. The Bulletin states:

In order to provide timely and uniform advice to tribes and their contractors, the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, if a tribe or contractor is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA, they should submit those agreements to the NIGC.

The NIGC continues to make itself available to review all such gaming-related contracts and agreements.