

# COMMENTS REGARDING 25 CFR Parts 502, 556, and 558

(See comments referencing highlighted or redlined areas in proposed rule below)

(Only those areas of the proposed rule with comments are included)

## DEPARTMENT OF THE INTERIOR

### National Indian Gaming Commission

#### 25 CFR Parts 502, 556, and 558

#### Definitions; Background Investigation for Primary Management Officials and Key Employees; Gaming Licenses for Primary Management Officials and Key Employees

**AGENCY:** National Indian Gaming Commission, Department of the Interior. **ACTION:** Proposed rule.

**SUMMARY:** The National Indian Gaming Commission proposes to amend its regulations to add definitions, amend existing definitions, and amend requirements for conducting background investigations and issuing licenses. Proposed amendments include adding general managers and other persons with similar management responsibility to the primary management official definition; limiting the definition to those with duties similar to those of a chief financial officer rather than persons who have financial management responsibility; and limiting primary management officials to employed management officials designated by Tribes instead of any person so designated. The proposed amendments to the key employee definition consolidate certain of its subsections; include gaming operation employees authorized for unescorted access to secured areas that are designated as such by Tribal gaming regulatory authorities; remove compensation as determinative factor with the exception of the four most highly compensated persons in the gaming operation; and allow Tribes to designate any other employee of the gaming enterprise as a key employee instead of “any other person.” Other proposed amendments incorporate the addition definitions for Gaming Enterprise and Tribal Gaming Regulatory Authority and clarify licensing application and background investigation retention. Specifically, the proposed amendments focus on licensing of primary management officials and key employees instead of employment of them; adding notification requirements for licensing revocation decisions; specifying retention requirements of information and documentation post termination; and changing the vesting of a right to a hearing to reflect Tribal law and policy.

#### I. Background and Development of the Rule

##### A. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act established the National Indian Gaming Commission (“NIGC” or “Commission”) and set out a comprehensive framework for the regulation of gaming on Indian lands. IGRA requires that Tribal gaming ordinances provide “an adequate system which ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and includes—

- (I) Tribal licenses for primary management officials and key employees of the gaming enterprise . . . ;
- (II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and
- (III) notification by the Indian Tribe to the Commission of the results of such background check before the issuance of any of such licenses.”

The Commission first defined “key employee” and “primary management official” in April of 1992 (57 FR 123802-01). As mandated by IGRA, applicants for key employee and primary management official positions are subject to a background investigation as a condition of licensure. In 2009, the Commission expanded these definitions to permit Tribes to designate other persons as key employees or primary management officials (74 FR 36926). The U.S. Department of Justice, Federal Bureau of Investigation (FBI) took issue with this expansion, denying the processing of criminal history record information (CHRI) for the expanded positions’ background investigations. This proposed rule rectifies that issue in part 502, limiting Tribal designations to “[a]ny other employee of the gaming enterprise designated by the Tribe as a key employee” and “[a]ny other employed management official of the gaming enterprise designated by the Tribe as a primary management official.”

Background investigation and licensing regulations for key employees and primary management officials were initially issued by the Commission in January of 1993 (58 FR 5802-01) in parts 556 and 558, respectively. The Commission updated these regulations in 2013 to streamline the submission of documents; to ensure that two notifications are submitted to the Commission in compliance with IGRA; and to clarify the regulations regarding the issuance of temporary and permanent gaming licenses (78 FR 5276-01). As for part 556, this proposed rule incorporates the Gaming Enterprise definition, as needed, and modernizes the licensing application and background investigation retention requirements. And for part 558, the proposed rule emphasizes primary management official and key employee licensing rather than their employment; adds notification requirements for licensing revocation decisions; details the retention requirements of information and documentation related to key employees and primary management officials after their employment ceases; and updates the vesting of a right to a hearing to include the requirements of Tribal law and policy.

## B. Development of the Rule

On, June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the key employee and primary management definitions and the background and licensing regulations. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments to these regulations were intended to: address FBI's concerns regarding the key employee and primary management official definitions; include gaming operation employees with unescorted access to secured areas as key employees; combine certain subsections of the key employee definition; add general managers and similar positions to the primary management official definition; and update licensing application and background investigation retention requirements.

The Commission held two virtual consultation sessions in July of 2021 to receive Tribal input on the possible changes.

The Commission reviewed all comments received as part of the consultation process. Several comments were concerned that defining a key employee as a "Custodian of gambling device or system records" would make TGRA personnel key employees. To address this concern, the Commission is proposing to limit the definition to persons who perform that function "for the gaming operation." It is not the Commission's intent to capture TGRA employees or non-gaming operation personnel in the definition. A similar comment sought clarification as to whether "any person authorized by the gaming operation for unescorted access to secured areas" includes TGRA personnel. Again, it does not as in most cases the TGRA, not the gaming operation, authorizes TGRA personnel's access to restricted areas.

However, under provision § 502.14(d) – "any other employee of the gaming enterprise designated by the Tribe as a key employee"--A Tribe may, at its discretion, designate TGRA personnel as key employees through its gaming ordinance, since the "Gaming Enterprise" definition includes "the entities through which a Tribe conducts, regulates, and secures its gaming . . ."

Likewise, if it so chooses, a Tribe may deem TGRA supervisory personnel as primary management officials under § 502.19(e) - "any other employed management official of the gaming enterprise designated by the Tribe as a primary management official."

The intent of both proposed provisions is to provide maximum flexibility to Tribes.

### PART 502—DEFINITIONS

#### ■ 2. Revise § 502.14 to read as follows:

##### § 502.14 Key employee.

*Key employee* means:

- (a) Any person who performs one or more of the following functions for the gaming operation:
  - (1) Bingo caller;
  - (2) Counting room supervisor;
  - (3) Chief of security;
  - (4) Floor manager;
  - (5) Pit boss;
  - (6) Dealer;
  - (7) Croupier;
  - (8) Approver of credit;
  - (9) Custodian of gaming systems as defined in 25 CFR 547.2 and similar class III systems, gaming cash or gaming cash equivalents, or gaming system records;
  - (10) Custodian of surveillance systems or surveillance system records.
- (b) Any person authorized by the gaming operation for unescorted access to restricted areas designated as restricted areas by the TGRA;
- (c) If not otherwise licensed as a key employee or primary management official, the four most highly compensated gaming operation (or enterprise depending on your intention) employees by the gaming operation.
- (d) Any other employee of the gaming enterprise designated by the Tribe as a key employee in its gaming ordinance.

#### ■ 3. Revise § 502.19 to read as follows:

##### § 502.19 Primary management official.

*Primary management official* means:

- (a) Any person having management responsibility for a management contract;
- (b) Any gaming operation (or gaming enterprise depending on your intention) employee who has authority:
  - (1) To hire and fire employees of the gaming operation; or
  - (2) To establish policy for the gaming operation; or
  - (3) To supervise a key employee of the gaming operation.
- (c) The chief financial officers or other positions with duties similar to a chief financial officer of the gaming operation (or enterprise depending on your intention).
- (d) The general manager or a position with duties similar to a general manager.
- (e) Any other employed management official of the gaming enterprise designated by the Tribe as a primary management official in its gaming ordinance.

#### ■ 4. Add §§ 502.25 and 502.26 to read as follows:

##### § 502.25 Gaming Enterprise.

*Gaming Enterprise* means the entities through which a Tribe conducts, regulates, and secures gaming on Indian lands within such Tribe's jurisdiction pursuant to the Indian Gaming Regulatory Act.

## **PART 556—BACKGROUND INVESTIGATIONS FOR PRIMARY MANAGEMENT OFFICIALS AND KEY EMPLOYEES**

### **6. Amend § 556.4 by revising the first sentence of the introductory text to read as follows:**

#### **§ 556.4 Background investigations.**

A Tribe shall perform a background investigation for each primary management official and for each key employee of the gaming enterprise.

### **7. Amend § 556.6 by revising the first sentence of paragraph (a) to read as follows:**

#### **§ 556.6 Report to the Commission.**

(a) When a Tribe licenses a primary management official or a key employee, the Tribe shall maintain the information listed under § 556.4(a)(1) through (14).

## **PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS**

### **10. Revise § 558.3 to read as follows:**

#### **§ 558.3 Notification to NIGC of license decisions and retention obligations.**

- (a) After a Tribe has provided a notice of results of the background check to the Commission, a Tribe may license a primary management official or key employee.
- (b) Within 30 days after the issuance of the license, a Tribe shall notify the Commission of its issuance.
- (c) A key employee or primary management official who does not have a license after ninety (90) days shall not be permitted to perform the duties, functions, and/or responsibilities of a key employee or primary management official until so licensed.
- (d) If a Tribe does not license an applicant—
  - (1) The Tribe shall notify the Commission; and
  - (2) Shall forward copies of its eligibility determination and notice of results, under § 556.6(b)(2) of this chapter, to the Commission for inclusion in the Indian Gaming Individuals Record System.
- (e) If a Tribe revokes a key employee or primary management official's license—
  - (1) The Tribe shall notify the Commission; and
  - (2) Shall forward copies of its license revocation decision and a summary of the evidence it relied upon to the Commission for inclusion in the Indian Gaming Individuals Record System.
- (f) A Tribe shall retain the following for inspection by the Chair or their designee for no less than three years from the date of termination of employment:
  - (1) The information listed under § 556.4(a)(1) through (14) of this chapter;
  - (2) Investigative reports, as defined in § 556.6(b) of this chapter;
  - (3) Eligibility determinations, as defined in § 556.5 of this chapter;
  - (4) Privacy Act notice, as defined in § 556.2 of this chapter; and
  - (5) False Statement notice, as defined in § 556.3 of this chapter.