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November 1, 2021

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

Re: Tribal Comments to the Final Draft of the NIGC's Proposed Changes to its Regulations

Dear Chair Simermeyer & Members of the Commission:

Included in with this letter are the Quapaw Nation Gaming Agency's comments on the National Indian Gaming Commission's proposed amendments to its regulations, which were discussed and presented via video conference on September 21-22, 2021, and October 21, 2021. We sincerely appreciate the NIGC's efforts to solicit and consider tribal input on these matters, which will have a tangible impact on Tribal Gaming Regulatory Agencies' ability to adequately protect the integrity of gaming.

Erin Eckhart, Acting Director
Quapaw Nation Gaming Agency

Enclosure.

COMMENTS OF THE QUAPAW NATION GAMING AGENCY ON THE NATIONAL INDIAN GAMING COMMISSION'S PROPOSED REVISIONS TO ITS REGULATIONS, AS WELL AS ITS REQUEST FOR COMMENTS REGARDING ITS AUTHORITY UNDER THE INDIAN GAMING REGULATORY ACT.

I. INTRODUCTION

These comments are made in response to the topics of consultation published by the NIGC on its website and discussed via Zoom on September 21-22 and October 21, 2021. We are pleased to provide input on the proposed changes to its regulations regarding 1) the powers of the NIGC as delegated by IGRA to conduct necessary background investigations, 2) audit standards for small and charitable gaming operations, 3) audit standards, in general, 4) self-regulation of Class II Gaming, 5) NIGC fee regulations, and 6) appeals proceedings before the NIGC.

The Quapaw Nation Gaming Agency ("QNGA") therefore submits the following comments, which are included under headings of the consultation topics below.

II. COMMENTS

A. Background Investigations (25 U.S.C. § 2706 (b)(3))

The QNGA is generally in favor of the revising the regulations for backgrounding and fingerprint submission for individuals other than Key Employees and Primary Management Officials as presently defined, as well as clarifying the meaning of the terms "Key Employee" and "Primary Management Official."

Under the Memorandum of Understanding between TGRAs and the NIGC concerning Criminal History Record Information ("CHRI"), TGRAs no longer have the discretion to designate an individual as a Key Employee or Primary Management Official. Unless the position is enumerated in the NIGC regulations, the employee will not qualify as a key employee even if that position is one of trust or discretion or has regular, independent access to a secured areas relative to a responsibility directly connected to the conduct of gaming. We think this is a mistake that could present asset protection vulnerabilities.

In order to fill the gap that has been created, we recommend classifying which types of positions warrant backgrounding based on the nature and duties of the position. As noted, for example, one approach would be to allow fingerprint processing through the NIGC for any person applying for a position of trust or discretion at a tribal gaming facility or any person who has regular, independent access to a secured area relative to a responsibility directly connected to the conduct of gaming. However, we strongly assert that making this determination should come within the discretion of TGRAs because they are in the best position to determine whether the position warrants backgrounding and licensing. Accordingly, should the NIGC determine to promulgate regulations to this effect, we would recommend that the NIGC extend the *potential* for TGRAs to process such individuals through the NIGC without *requiring* such practices for federal compliance.

As to vendors, we would strenuously object to the NIGC promulgating regulations related to vendor licensing. The QNGA is not clear on the NIGC's authority under IGRA to regulate these matters, and moreover, any such regulation would impermissibly interfere with a well-developed and long-tested systems established by TGRAs to ensure that vendors meet the Quapaw Nation's suitability standards for licensure. Over a period of years, the QNGA has developed a system that entails the issuance of gaming vendor licenses for gaming and gaming related vendors and a registration process for all other vendors. Finding the right balance when it comes to vendor licensing is hard earned, but we believe that the QNGA and most other, if not all other Oklahoma TGRAs have achieved that balance. It would be extremely disruptive if this balance were disturbed.

B. Audit Standards for Small and Charitable Gaming Operations (25 C.F.R. Part 571)

While the QNGA supports some of the regulatory changes proposed by the NIGC to Part 571 that aim to ease the financial reporting requirements for small and charitable gaming operations, we believe that some of the proposed changes actually have the opposite effect. In particular, the QNGA is strongly opposed to the proposed deletion of the waiver opportunity under 25 C.F.R. § 571.12 (c) that could permit a small gaming operation to submit reviewed financial statements under subsection (c) even if the operation did not strictly comply with § 571.13 for the previous three years. Curiously, the NIGC presents this proposal as the elimination of the Commission's "waiver requirement." However, eliminating a waiver opportunity for a small gaming operation is diametrically different that eliminating a "waiver requirement." Accordingly, the QNGA disapproves of the NIGC's framing of this topic for consultation and is opposed to this proposed revision.

Further, the QNGA requests that the NIGC provide greater clarity as to how it envisions the proposed § 571.12 (c) will be harmonized with § 571.12 (d) and (e). Subsections (d) and (e) govern the submission of consolidated financial statements of multiple gaming locations. We would appreciate clarification how a tribal government with multiple gaming operations, some generating over $ 2 million per year and others qualifying as small and/or charitable gaming operations, could navigate these sections. Can a Tribal government choose to consolidate some gaming operations under subsections (d) and (e) and leave other (qualifying) gaming operations' financial information to be submitted under subsections (c) or (f)?

The QNGA also generally supports the NIGC's efforts to establish a third tier of financial reporting for charitable gaming operations. However, we believe the $50,000 threshold to be far too low, and request that the Commission consider raising the threshold to at least $100,000. We also believe that the NIGC should consider offering both Option 1 and Option 2 as available alternatives for tribal governments to choose from. We assume that the NIGC has expended quite a lot of time becoming comfortable enough with both of these options to offer them up for public comment, and we have a difficult time understanding why we must choose one or the other since both Options provide unique benefits to certain types of charitable gaming operations. In sum, we believe that having both options available as alternatives will incentivize (or at least not discourage) new charitable gaming operations from being established, and will allow those that have been in existence (and in compliance with § 571.13) for the previous three years to continue charitable gaming activities.

However, we do request that if the NIGC chooses to promulgate Option 1 (and only Option 1), that it consider doing away with the proposed § 571.12 (f)(4) which states that "[t]he Chair of the NIGC may, at his or her discretion, require any gaming operation subject to this paragraph (f) to comply with the annual audit requirement of paragraph (b)." If this provision were promulgated, it would put the whole proposed third tier of financial reporting at risk of collapse at any moment and for any reason (or even the lack thereof) if the Chair so chooses. There are no such standards that the Chair would have to abide by in the NIGC's proposal here which will undoubtedly expose the NIGC to assertions of arbitrary and capricious decision-making. Accordingly, we believe giving the Chair blanket authority to arbitrarily pick and choose which tribal governments may access this third tier of financial reporting – or whether the third tier should even exist at all – goes far beyond the Chair's already high level of authority under the NIGC's regulations.

If the NIGC decides to promulgate Option 2 (and only Option 2), we request that the Commission reconsider the requirement that a charitable gaming operation has complied with § 571.13 for the previous three years. We believe that this unnecessarily burdens new charitable gaming operations and discourages their establishment.

C. Audit Standards, Generally (25 C.F.R. Part 571)

The QNGA is opposed to most of the NIGC's proposed revisions to audit standards in Part 571 that impose additional regulatory requirements under the guise of mere clarifying edits. Most notably, we are against the addition of a "note" to 25 C.F.R. § 571.12 (b)(3), (d)(5), and (e)(5) which would provide that disclaimed and adverse opinions from an auditor will not satisfy the audit submission requirements as set forth in those subsections. Because of this "clarification," despite the submission of an audit opinion, the submitting tribal government will nevertheless be "subject to an action for failure to submit an audit" per the NIGC's accompanying consultation materials.

While we agree with the NIGC that adverse and disclaimed opinions *may* suggest that something is amiss at a gaming operation, there is no certainty that there are larger systematic problems present. This is especially so for consolidated audits submitted under subsections (d) or (e). If one employee at one gaming operation (out of several) makes a correctable mistake as it relates to recordkeeping, an auditor may find it necessary to issue a disclaimed opinion on the consolidated financial statements. This would have an immediate negative impact on all the other otherwise compliant gaming operations who submitted financial information pursuant to subsections (d) or (e). A disclaimed opinion in this context would then likely qualify as noncompliance with § 571.13 (a).[1] As discussed above, many benefits in § 571.12 are contingent on strict compliance with § 571.13 for the previous of three years, and a disclaimed opinion in the consolidated audit context could theoretically reset this clock for all gaming operations that submitted financials under subsections (d) or (e). Because the NIGC is creating a new and additional standard that could

[1] 25 C.F.R. § 571.13 (a) begins as follows: "Each tribe shall prepare and submit to the Commission two paper copies or one electronic copy of the financial statements and audits required by § 571.12[.]" Because adverse and disclaimed opinions will not satisfy the requirements in § 571.12 under the NIGC's proposed revision, it can be reasonably argued that a concurrent violation of § 571.13 would occur in the event of an adverse or disclaimed opinion.

create serious issues for tribal governments who submit consolidated financial statements under § 571.12 (d) and (e), we strongly oppose this proposed revision.

Similarly, the QNGA is concerned with the proposed amendments to 25 C.F.R. §§ 571.12 (b) and 571.13 (a) – (c). The proposed changes here again increase all tribal governments' exposure to a formal enforcement action without any intermediate steps to remedy noncompliance with this new regulatory requirement. Accordingly, as currently written, the QNGA does not support this proposed revision.

The QNGA does not oppose the proposed revisions to 25 C.F.R. § 571.12 (d) – (e) clarifying that only gaming operations with the same owner may submit consolidated audits. However, as it relates to the NIGC's attempt to clarify that "gaming operation" and "gaming facility" are synonymous, we believe there to be better alternatives that the NIGC's current proposal. If the terms are intended to be interpreted as one of the same, rather than just treated the same for the purposes of consolidated audits under § 571.12 (d), we recommend including such language in the definitions contained in Part 502. This will help clarify any potential ambiguities throughout the NIGC's regulations.

D. Self-Regulation (25 C.F.R. Part 518)

The QNGA is concerned that the proposed revisions to these sections neither sufficiently detail the standards to which a tribal government seeking self-regulated status is held, nor adequately provide due process protections for those tribal governments who possess a certificate of self-regulation. Accordingly, we would strongly recommend that the NIGC expand, in detail, the standards to which it holds tribal governments seeking a certificate of self-regulation in 25 C.F.R. 518.5 when assessing the provided information against the terms of 25 C.F.R. § 518.3 (a)-(e). We are particularly concerned that the full scope of what is assessed by the NIGC in these circumstances, including the detailed procedure for conducting such assessments, is not outlined in the pertinent regulation. The QNGA believes that increased transparency in this regard would greatly assist in making the process of achieving self-regulation more accessible and achievable, which is in the spirit of IGRA and its purposes of promoting strong self-governance.

In relation to changes relevant to tribal governments who hold a certificate of self-regulation, while we are not opposed to the change that would make the Office of Self-Regulation the entity that self-regulated tribes notify of relevant information under this section, we have several concerns as to the content of 25 C.F.R. § 518.11 at large.

First, the QNGA is concerned that the circumstances deemed specifically reportable by the regulation are currently overly vague. In particular, we would recommend providing a definition for what constitutes a reportable level of "financial instability" under this section. It is our opinion that fleshing out additional examples with regard to "any other factors that are material to the decision to grant a certificate of self-regulation," would aid in compliance, as well.

We are also deeply concerned that the scope of information that can be required for submission from tribal governments by the NIGC through the Office of Self-Regulation is overly broad, especially in the context of self-regulated tribes. Specifically, while "information relevant to any

material change in circumstances" affecting a tribal government's continued eligibility for self-regulated status may be of use to the NIGC in assessing a tribal government's continued capacity to effectively self-regulate, requiring that tribes also provide "information that may lead to information that is relevant to any material change in circumstances" is unclear and in excess of the purposes for which the NIGC is authorized to collect information.

The QNGA is also not opposed to a revision that would designate the Office of Self-Regulation as "the proponent of any case to revoke a certificate before the Commission," and we support the proposed regulatory amendment that would place the burden of proof on the Office of Self-Regulation to prove why a certificate of self-regulation should be revoked. However, we are concerned that, in light of the fact the Office of Self-Regulation is only staffed by one person, who is also a member of the Commission, which votes on the matter of whether to revoke the very certificates that they are tasked with arguing should be revoked. It is, therefore, the QNGA's opinion that, in the event that the Director of the Office of Self-Regulation is also an active Commissioner of the NIGC, the Director/Commissioner must be required to recuse themselves from consideration of any matter before the Commission regarding revocation of a certificate of self-regulation. Accordingly, we would recommend including a provision to this effect in the revised regulations.

E. Fees (25 C.F.R. Part 514)

The QNGA is largely in favor of regulatory revisions that would account for the potential for dramatic variations in assessable gaming revenue and the impact those variations may have on tribal governments. Instead of adjusting the timeline of when fees should be calculated and/or assessed, though, we would recommend that the fee assessment structure be tailored toward flexibility for individual tribal governments. Indeed, in our view, it is unlikely that the tribal gaming industry will again experience circumstances that lead to a universal plummet in revenue, such as we experienced with the COVID-19 pandemic. We would venture that it is almost certain, however, that individual gaming operations will experience extraordinary events that would lend themselves to regulatory flexibility.

Specifically, we recommend adjusting the regulations so that assessed fees may be remitted on a payment plan, which could reconfigure both the amount and date of the payment due. We further recommend that the NIGC include in the regulation that tribal governments who have experienced an "extreme" or "unexpected" deficit in revenue may request such a payment plan from the NIGC in a writing attesting to the circumstances warranting accommodation, which request shall not be unreasonably denied by the NIGC.

In any proposed revision to this effect, we would recommend including within the regulations a specific definition as to what would constitute an "extreme" and/or "unexpected" variation in assessable gross revenue. For instance, we would recommend including how variations in assessable gross revenue should be calculated (e.g., year over year, month over month, or comparatively to projected revenues). We would also recommend that the NIGC allow such variations to be expressed in a metric determined by the tribal government in question. For example, an extreme decrease in assessable gross revenues could be defined by decrease of a certain percentage or in a dollar amount since, depending on the size of the gaming operation and

the functions of the individual tribal government, one metric may better encompass the practical effects of the decreased revenue and, in turn, the negative impact future fees would pose while the tribal government is recovering from such decreased revenue.

Finally, as to encouraging utilization of electronic methods of fee payments, the QNGA would recommend designing the payment portal for ease of use, accessibility, and security. Specifically, we would urge the NIGC to dedicate special attention to the payment portal's security safeguards and ensure the payment portal accepts multiple forms of payment methods (Card, ACH, and secure third-party processing methods), is compatible with screen readers, uses clear labels with contrasted colors, provides detailed instructions, and is readily and easily accessible from the NIGC website. We would also recommend, per the NIGC's strategic goals concerning transparency, that the NIGC, inform regulated tribal governments on a quarterly basis of the utilization rates of electronic payment methods, as well as the associated cost savings brought about thereby.

F. Appeals Proceedings Before the NIGC (25 C.F.R. Part 585)

The QNGA does not support the proposed revisions to 25 C.F.R. § 585.4 (b) which would permit the Chair to respond to motions filed in appeals proceedings before the NIGC. As alluded to previously in these comments, the QNGA believes that when compared to the other members of the NIGC, the Chair already exerts a disproportionate amount of authority over almost every facet of the NIGC's regulations. This is especially so in the enforcement action context. Now, the NIGC is proposing to delegate the Chair even more power in appellate proceedings before the Commission – specifically the power to respond to motions filed by appellant tribal governments.

Because in appeals before the NIGC under Part 585 the decision being appealed is almost always a prior decision made by the Chair, we believe that the NIGC should look at paring down the Chair's powers in this context not adding to it. It is our opinion that permitting the Chair to serve in the roles of prosecutor, judge, and jury in the first instance, and then allowing him or her to serve as a party on appeal, a litigator, and a judge in the second instance under Part 585 immediately raises issues of fundamental fairness. Accordingly, we recommend that the NIGC amend Part 585 to require the NIGC Chair to recuse him or herself from all decisions of the Commission under Part 585. If the Chair was required to recuse himself from the decisions that the NIGC is supposed to make as a body under Part 585, we would have little issue with the Chair responding to written motions under this section. But continuing to add to the Chair's nearly unfettered authority in the enforcement action process does not bode well for instilling confidence in the integrity of the NIGC's appellate processes.

However, the QNGA does support the proposed addition to 25 C.F.R. Part 585 concerning the settlement of appeals before the NIGC. Establishing a process that a tribal government and the NIGC can reference for settlement negotiations will be mutually beneficial to both parties. However, because settlements are generally beneficial to both parties, we request that the NIGC remove the requirement from its proposed revision stating that requests for negotiations be submitted five (5) days prior to the commencement of a proceeding. While the NIGC has the authority to waive most procedural requirements in Subchapter H, we find this timeframe unnecessary, not aligned with how requests for settlement are handled in other contexts, and serves

no real apparent purpose other than convenience for the NIGC. In the formulation of the regulations in § 585.8, we also request that the NIGC insert a provision in this proposed subsection specifying that the NIGC will consider any and all such requests to enter into settlement negotiations in good faith.

III. CONCLUSION

The QNGA appreciates the opportunity to provide comments to the NIGC, and we are confident that, through cooperative discourse, the NIGC will achieve regulations that foster the integrity of gaming without imposing an undue burden on TGRAs, tribal governments, and tribal gaming operations. We look forward to continuing to engage in meaningful consultation with the NIGC on these matters throughout the revision process.