NATIONAL INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

Comments of the National Indian Gaming Association on the National Indian Gaming Commission's Request for Comments on Potential Regulatory Revisions – Series B.

I. Introduction

These comments are made in response to the National Indian Gaming Commission's ("NIGC's") Series B topics presented via video conference on September 21-22, 2021, and October 21, 2021. We are pleased to provide input on the NIGC's proposed changes to its regulations.

II. Comments

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

> 1. "…[W]hat are Tribes' views on who warrants backgrounding? Should the determination be made based upon access as described above, job duties, a ten percent or more ownership interest in the company, or all these criteria? And how should these criteria be qualified or defined? Should access be limited to routine access? What job duties do Tribes believe warrant backgrounding? What other factors, if any, should be considered? Further, must licenses be issued to these individuals?"

It is our understanding that the NIGC's revised Memorandum of Understanding concerning use of Criminal History Records Information has, in effect, revised NIGC's background investigations regulatory provisions, resulting in the elimination of provisions granting Tribal Gaming Regulatory Agencies (TGRAs) a degree of discretion in determining whether the occupant of a position should be licensed. The NIGC regulations, 25 C.F.R. § 502.14 (a), outline specific duties that qualify an individual as a Key Employee, including working as a bingo caller, counting room supervisor, chief of security, custodian of gaming supplies or cash, floor manager, pit boss, ***dealer***, croupier, approver of credit, and/or custodian of gambling devices.[1] Persons filling other roles may also be considered Key Employees if that person earns over fifty thousand dollars ($50,000) per year or is among the four (4) most highly compensated individuals in the gaming operation.[2]

While we understand that this provision in the MOU limiting TGRA discretion was in response to pressure from the Federal Bureau of Investigation based on concerns about the use of its data, we are concerned that this change may not be in the best interest of tribal governments and the change appears to demonstrate a lack of confidence in the judgment of TGRAs. Since a primary purpose of IGRA is to strengthen tribal governments, these decisions appear inconsistent with the statute.

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[1] 25 C.F.R. §502.14 (a)(1)-(10) (emphasis added).
[2] 25 C.F.R. § 502.14 (b)-(c).

Regarding the question concerning vendor licensing, we note that IGRA does not reference vendor licensing at all. Accordingly, we see no basis for the exercise of federal authority when it comes to vendors. It is our understanding that most, if not all, TGRAs operate programs for licensure and/or registration of gaming, gaming related, and/or non-gaming vendors, we are curious about the basis for NIGC's questions in this regard. We believe that further discussion of this topic is needed.

> 2. "As to Class III gaming, compacts may require some states to conduct significant background investigations on prospective vendors. Those states typically maintain a matrix of approved vendors. Should the NIGC exempt individuals from state-approved vendors from the background investigation process? Or limit the investigation requirements? What do Tribes suggest should be included for limited investigation submissions?"

As expressed above, there are serious questions as to the NIGC's regulatory authority related to vendor licensing. Accordingly, we do not find vendor licensing an appropriate subject for federal rulemaking.

> 3. "Instead of promulgating these regulations, would it be better if the Commission used its authority under IGRA, 25 U.S.C. § 27081, to request information from other government agencies, such as FBI, IRS, FinCEN, and OFAC, to provide information necessary for NIGC investigations of potential bad actors associated with gaming vendors, suppliers, equipment manufacturers, and consultants? Potential violations of law then could be referred to appropriate law enforcement, including federal, state, and tribal civil and criminal law enforcement agencies."

If the NIGC is in possession of information indicating that certain persons associated with a gaming vendor may be bad actors, we urge that the appropriate course would first be to bring such information to the attention of the TGRA for investigation. If the NIGC has evidence that a violation of criminal law has been committed by such person, a referral to the appropriate law enforcement agency is the appropriate course of conduct. The actions of administrative agencies are constrained by the agency's statutory delegation. In relation to tribal gaming, TGRAs have the primary regulatory role, which should be respected and supported.

B. Submissions of the Annual Audit (25 C.F.R. Part 571)

1. "The current audit regulations do not directly address instances where an auditor finds that the financial statements may be incomplete or inaccurate. Regulators need complete and accurate information to identify and prevent theft and to make regulatory decisions. . . . Under the proposed changes, tribes that submit an Adverse or Disclaimed Opinion as part of their audit will therefore be subject to an action for failure to submit an audit. As always the Chairman has discretionary enforcement authority."

We believe that this topic warrants additional consideration. Certainly, an adverse and/or disclaimed opinion raises concerns, but the effect of this revision would be to create a new basis for an enforcement action without an intermediate investigative step. It could also serve as a disincentive to submit the adverse or disclaimed opinion at all, since doing so would result in an

equally harsh result as would submitting nothing. We suggest that in these circumstances, the more appropriate first step would be to send a letter of concern and an offer of technical assistance.

2. "The proposed changes distinguish between the audit process and the final product to be submitted. An audit is the process of testing, inspecting, and observing that a CPA firm undertakes to verify an operation's financial statements and controls. The audit report and opinion are the product of that process. The two are often interchangeable in parlance, but the regulation would benefit from more precise language clarifying that it is the product – the third-party verified information – that the agency requires for its regulatory decisions, not merely the knowledge that the gaming operation completed the process."

Similar to the previous response, we are concerned that the proposed amendments to 25 C.F.R. §§ 571.12 (b) and 571.13 (a) – (c) will increase all Tribes' exposure to a formal enforcement action without any intermediate steps to remedy noncompliance with this new regulatory requirement. Accordingly, as currently written, we remain deeply troubled by this proposed revision.

3. "Prerequisites For Consolidated Audits."

    i. "These proposed changes to § 571.12 (d)(1) and (e) make explicit the implicit auditing requirement that only operations with the same owner (i.e., the tribe) may be consolidated. Generally Accepted Accounting Principles prevent the consolidated audits of businesses with different owners. . . . Audits must be performed in accordance with GAAP (25 C.F.R. § 571.12 (b)(2)), the suggested changes clarify the ambiguity."

It is not clear to us the circumstances in which a non-tribally owned gaming operation and a tribally owned gaming operation would seek to file a consolidated audit report. Moreover, it appears that GAAP, compliance with which is mandatory, already addresses the issue.

    ii. "The second suggested change in § 571.12 (d) from [sic] "gaming operation" to "tribe" corrects an error and restores meaning to the regulation. The Audit Division takes the view that *operation* and *facility* are synonymous. Under that view, the current regulation is nonsensical: a gaming operation cannot have multiple facilities because a gaming operation *is* a facility."

It is not clear to us that the terms "operation" and "facility" are synonymous. We view an operation as the ownership structure operating one or more gaming facilities, which is where the gaming activity takes place. We do understand that the terms are often used interchangeably in the vernacular, but technically, we see each term as representing a related, but discrete concept. In fact, some tribal governments may create multiple gaming operations to operate one (or more) gaming facilities while the second operation may operate one or more other facilities.

4. "The proposed change streamlines the process for granting a waiver. It would allow the Commission to delegate its authority to grant waivers permitting tribes to submit financial reviews or consolidated audits. . . . To mitigate the risk [of financial reviews and consolidated audits], the Commission required tribes to be in strict compliance with the audit regulations for the past three years in order to qualify – or to receive a waiver from the Commission. The proposed change allows the Commission to delegate its authority to grant a waiver to other divisions, thereby allowing a faster response to the tribe."

We assume that any designee under the NIGC's proposed revision here would be another Commissioner, NIGC staff, or a specific department within the NIGC, but we urge that the details be spelled out in the rule to prevent uncertainty or confusion.

C. Appeals on Written Submissions (25 C.F.R. Part 585)

1. "NIGC regulations at 25 C.F.R. § 585.4 provide that in appeals on written submissions to the Commission, the Chair may not file or respond to motions. The Commission shares the attached proposed regulatory change to 25 C.F.R. § 585.4 to allow the NIGC Chair to file motions in appeals on written submissions and to respond to motions when invited, directed, or granted leave to do so by the Commission."

We are troubled by 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. Adding to the Chair's powers during these appellate proceedings when the Chair already gets to vote on whether to uphold or reverse the Chair's prior decision seems to deepen fundamental fairness and due process concerns.

Under IGRA, the Chair serves as the sole decisionmaker in whether to initiate an enforcement action against - not a gaming operation or enterprise - but a Tribal government. Part 585 provides an appellant with an avenue to appeal the Chair's initial decision via written submissions to the NIGC. Currently, throughout the appeals process in Part 585, when the NIGC is reviewing the Chair's initial decision, the Chair may act as a member of the larger NIGC body and is seemingly granted authority to vote on whether any other motion listed in § 585.4 (a) may be filed by an appellant, and the ultimate disposition of the appeal.

Adding to this largely unconstrained authority, allowing the Chair to file responsive motions creates a circumstance where the Chair is acting as a litigator, an appellate judge, and a party to the matter on appeal. Additionally, the proposed revisions here contain no requirement that the Chair would have to abstain from the NIGC vote to determine whether the Chair is authorized to file responsive motions in the first place. Finally, under this proposed regime, the Chair will seemingly be permitted to rule on the competing motions – one of which is the Chair's own submission.

The NIGC appellate processes have long presented fundamental fairness and due process concerns. Allowing the Chair to become an adverse litigant by responding to motions filed by appellant Tribal governments, while simultaneously serving a member of the body voting whether or not to authorize the Chair to respond to such motions and on the disposition of the competing motions,

offends our understanding of the traditional notions of due process of law. As the Supreme Court has stated, "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

In sum, we believe that should the NIGC desire to have the Chair respond to written motions under Part 585, the Chair must be required to recuse himself or herself from **all** decisions made by the NIGC as a body in this Part. We believe that this should be the case whether the NIGC chooses to promulgate a regulation authorizing the Chair to file responsive motions under Part 585. We are concerned that if the Chair is to be permitted by regulation to rule on his or her own responsive motions filed in response to a Tribal government in a pending appeal would greatly undermine the integrity of the NIGC's adjudicative process. Accordingly, we believe that further consideration is needed in relation to the amendment of § 585.4 (b).

> 2. "NIGC regulations provide a structure for settlement in proceedings before a Presiding Official, but not for proceedings on written submissions to the Commission. The Commission suggests addressing this discrepancy by establishing the attached settlement process. It is similar to that provided for in PO hearings, with some necessary modifications to suit appeals directly before the Commission."

Processes advancing the potential for settlements benefit both parties. As such, we are not clear on the utility of an arbitrary deadline in relation to requests for settlement negotiations on written submissions. Accordingly, we support including a provision allowing for settlement negotiation for proceedings on written submission to the Commission, but urge that the NIGC remain open to good faith settlement negotiations at all stages of the proceeding.

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

> 1. "The Commission proposes exploring options for including a mechanism within the NIGC fee regulations to adjust the assessed fiscal year in response to extreme and unexpected variations in assessable gross revenues. The assessed fiscal year is defined by NIGC fee regulations as the gaming operation's fiscal year ending prior to January 1 of the year the Commission adopted fee rates. This definition is intended to result in all gaming operations applying the same fiscal year's audited revenues to the same fee rate, but it also results in at least a calendar year transpiring between the end of the assessed fiscal year and a fee payment calculated using that fiscal year. Thus, during the pandemic, fee payments were calculated using pre-pandemic assessed fiscal years and post-pandemic, fee payments will be calculated using pandemic impacted assessed fiscal years. The Commission seeks tribal input, feedback, and suggestions on a mechanism to adjust the assessed fiscal year to address these concerns in response to extreme and unexpected variations in assessable gross revenues."

The Covid-19 Pandemic has certainly posed numerous challenges for the world at-large and brought numerous issues heretofore unconsidered to the forefront. While we are inclined to support broader changes in the NIGC's fee calculation and assessment timelines in the event of "extreme and unexpected variations in assessable gross revenues," we believe that more discussion

as to the specifics are first needed. We also believe that any rule should provide protections for tribal governments experiencing discrete hardships resulting in reduced gaming revenue. The likelihood of a condition affecting all tribal governments is fairly low, but many conditions may result in individual tribal governments to suffer from severely reduced revenue. We urge the NIGC to provide for accommodations made upon written request, such as: 1) reduction in payment of fees; or 2) payment of fees on an extended payment schedule.

We believe that, in order for such a regulatory change to be practical, circumstances leading to the variation in assessable gross revenue need to be sufficiently broad so as to be inclusive of the varied experiences of tribal governments throughout Indian Country. For example, unexpected and/or extreme variations could be the result of government action or restriction, public health guidance, natural disasters, suspensions of utilities or other emergency or sanitation services, or other traditional force majeure causes.

> 2. "The Commission proposes mandating a process for reporting on the amounts the NIGC has available to carry over at fiscal year-end. The Indian Gaming Regulatory Act provides that fees "shall be available to carry out the duties of the Commission, to remain available until expended." 25 U.S.C. § 2717a. In addition, the Commission proposes requiring that NIGC budget commitments maintain a two-quarter transition fund. This reporting and budget requirement is intended to better inform tribes of the NIGC budget and to better prepare the NIGC for unexpected budgetary impacts."

We support NIGC transparency in all matter, particularly its finances. We have long been concerned that with the cessation of the Biennial Report to the Congress, the agency's transparency has suffered. Furthermore, the NIGC's Green Book submissions provide very little information other than the total amount of the budget and the number of FTE's. Given that tribal governments provide 100% of the NIGC's funding, we support the issuance of a Biennial Report not to Congress, but to Tribal Governments. To the extent that the NIGC wishes to maintain a permanent reserve fund, we urge that a high degree of transparency is essential for tribal support.

> 3. "The Commission proposes revising the fee regulations to incentivize electronic submission of fee payments, provide for flexibility in quarterly payments under certain circumstances, and provide guidelines for the fee rate calculation for self-regulated tribes. The Commission believes that increased adoption of electronic submission of fee payments will result in administrative cost savings for both the NIGC and tribal gaming operations and seeks tribal input on a means to incentivize electronic payment adoption. The Commission further proposes exploring options for providing gaming operations with increased flexibility in the timing of the quarterly payments in response to extreme industry-wide impacts such as the global pandemic. Finally, the Commission seeks tribal input on fee rate calculations for self-regulated tribes and whether additional guidance or regulatory changes are warranted to incentivize self-regulation."

In general, these concepts are worth of favorable consideration. As long as the means for making an electronic payment is safe and secure, we doubt this proposal will receive resistance. We do believe that the NIGC should reconsider its Self-regulation program to determine why so few tribal

governments have take advantage of it. We are concerned that the current regulations make it virtually impossible for tribal governments to achieve Self-regulation status.

E. Small and Charitable Gaming (25 C.F.R. Part 571)

1. "[In 25 C.F.R. § 571.12] Eliminate the Commission waiver requirement for reviewed financial statements and allow all operations grossing less than $2 million in the previous fiscal year to submit reviewed financial statements provided that the tribe or tribal gaming regulatory authority permits the gaming operation to submit reviewed financials, and the gaming operation has no instance of non-compliance with 25 C.F.R. §§ 571.12 and 571.13 for the three previous years."

We question the proposed revision of 25 C.F.R. § 571.12 (c)(2). It appears that the NIGC has framed this proposal as the elimination of a "waiver requirement," yet there does not appear to be any elimination of a "waiver requirement." Instead, it appears that the proposed revision will eliminate the opportunity for tribal governments with small gaming operations to request and receive a waiver from the NIGC to submit reviewed (rather than audited) financial statements even if a tribe failed to strictly comply with § 571.13 for the three (3) previous years.

We are concerned that the proposed regulatory change will not be beneficial to small gaming operations and strongly encourage the NIGC to keep this waiver opportunity in its regulations. If the NIGC nevertheless chooses to make this regulatory change to § 571.12 (c), we urge the NIGC to consider changing its view of requiring strict compliance with § 571.13 with a requirement to affirm that there has been no documented non-compliance with § 571.13 instead. Without the waiver opportunity coupled with the requirement for strict compliance with § 571.13, newer small gaming operations will be forced to use the more onerous reporting standards in § 571.12 (b) despite never having any issues of compliance with § 571.13.

2a. "[Option 1] Create a third tier of financial reporting for charitable gaming operations with annual gross revenues of $50,000 or less where, if permitted by the tribe, a charitable gaming operation may submit financial information on a monthly basis to the tribe or the tribal gaming regulatory authority and in turn, the tribe or TGRA provided an annual certification to the NIGC regarding the charitable gaming operation's compliance with the financial reporting."

2b. "[Option 2] Create a third tier of financial reporting for charitable gaming operations with annual gross revenues of $50,000 or less where, if permitted by the tribe, a charitable gaming operation may submit complied financial statements provided the charitable gaming operation has no instance of non-compliance with 25 C.F.R. §§ 571.12 and 571.13 for the three previous years."

Before getting to the specifics of each of the NIGC's options concerning financial reporting by qualifying charitable gaming operations, we generally favor the creation of a third tier of financial reporting for charitable gaming operations. However, we urge the NIGC to consider raising its $50,000 gross revenues threshold in its proposal.

As for Option 1, we believe that this proposal is better than Option 2 for **new** charitable gaming operations. Option 1 would enable new charitable gaming operations to receive the benefits from this third tier of financial reporting since there is no requirement for strict compliance with § 571.13 for the previous three years.

However, the proposed subsection (f)(4) in Option 1 which states that "the 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)" is objectionable. This language appears to open the door for patchworked enforcement of this regulatory provision and would permit a future Chair to eliminate this third tier of financial reporting altogether without going through notice and comment rulemaking. Further, from a business perspective, it is our opinion that creating a benefit that will assuredly be relied upon but that can be taken away at any time for any reason (or no reason) is not much better than never having received the benefit in the first place. Accordingly, we oppose granting the Chair this untethered discretion in subsection (f)(4) of Option 1.

As for Option 2, we believe that the proposed subsection (f) here is far more beneficial to charitable gaming operations that have been in existence, and in strict compliance with § 571.13, for at least the three previous years. We are concerned with this proposal because until there has been compliance with § 571.13 for three years, a charitable gaming operation will have to comply with the more onerous § 571.12 (b) until it qualifies for the third tier under proposed subsection (f) under Option 2. It is our view that this concern could be alleviated if the NIGC adopted a no noncompliance with § 571.13 for the previous three years standard, rather than requiring strict compliance with § 571.13 for the previous three years in order to qualify. We are also concerned that the language in proposed § (f)(2) may lead to inadvertent noncompliance with this section due to the vagueness of the requirement that "the tribe or TGRA informs the NIGC of such **permission**" to submit a review of financial statements.

Ultimately, however, we believe that the NIGC's goal to create a third tier of financial reporting would be better served if both Options 1 and 2 were included in part 571. Because one option is particularly useful for charitable gaming operations that have been in existence and in compliance with § 571.13 for three years, while the other is beneficial to all charitable gaming operations no matter how long they have been in existence, we believe having both options at a Tribe's disposal will provide the most benefit to a wider variety of tribal governments.

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

1. "Section 518.7(f) currently states, "The Commission shall issue a final determination 30 days after issuance of its preliminary findings or after the conclusion of a hearing, if one is held. The decision of the Commission to approve or deny a petition shall be a final agency action." A certificate is valid beginning the next calendar year. Section 518.7(f) does not clearly state whether the Commission can issue its final decision before the end of the 30-day deadline. To ensure an eligible tribe receives a certificate before the end of a calendar year, the Commission is considering revising § 518.7(f) to clarify that the Commission may issue its final decision within 30 days (as opposed to waiting the full 30 days) if it is clear that the tribe does not want a hearing before the Commission."

As noted previously, the Self-regulation regulations should be reviewed because they have not been effective. While we have no objection to the proposed clarification as to when the NIGC may issue a final decision regarding whether a self-regulation certificate should issue, we assert that further clarification is warranted. Many procedural questions are left unanswered. What happens, for example, if a tribal government does not want a hearing before the Commission?" To whom or which office should such notice be directed? What, if any, restrictions exist as to who may send such a notice, the contents of the notice, and what it must include. Next, we would recommend clarifying that the NIGC may issue their decision *within* 30 days of any hearing held, as well.

Further, we urge the NIGC to expand, in detail, the standards to which it holds tribes seeking a self-regulation certificate in 25 C.F.R. § 518.5 when assessing the provided information against the terms of 25 C.F.R. § 518.3 (a)-(e). Although tribal governments must meet or exceed many of these standards to remain in compliance with federal and tribal law and regulations, a disproportionately low number of tribes have been granted a certificate of self-regulation. We are thus concerned, that the regulations do not make clear the full scope of what the NIGC is assessing. Determining why the program has languished for so long is a worthy inquiry in advance of rulemaking.

> 2. "Section 518.2 states that the Office of Self-Regulation will administer the self-regulation program on behalf of the Commission. To clarify and expand the Office of Self-Regulation's role in the process, the Commission is proposing the following revisions to Part 518:"
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> > i. "Section 518.11 – Instead of the Commission receiving notifications of material changes from self-regulated tribes, the Office of Self-Regulation will be the entity that self-regulated tribes must notify. Also, consistent with the Commission's remaining investigatory and enforcement authority once the Commission issues a certificate, the Office of Self-Regulation may request information from a self-regulated tribe;"

To begin, we have several concerns as to the content of 25 C.F.R. § 518.11 generally. First, we are concerned that the "three business day" window for advising the Office of Self-Regulation of any changes material to the approval criteria in § 518.5 is too brief, such that it may artificially elicit non-compliance. For example, a tribe would likely have a duty to report "evidence of criminal or dishonest activity" material to § 518.5 (a)(1)(iii), but pursuant to a tribe's due process protections, determining whether initial evidence rises to the level of material evidence may take longer than three business days. Accordingly, we would recommend either extending the reporting deadline or revising the language in this section to trigger that clock for giving notice after the tribe has determined that something constitutes reportable information.

Additionally, the circumstances deemed specifically reportable by the regulation are currently overly vague. Providing a definition of what constitutes a reportable level of "financial instability" under this section might help. Providing additional specific examples of reportable information would also be helpful in this section.

Finally, we are concerned that the scope of collections permitted to be requested from tribes by the NIGC through the Office of Self-Regulation is overly broad, especially in the context of self-regulated tribes. First, it is our opinion that it is unreasonable to base "grounds for revocation of a certificate of self-regulation" on a tribe's failure to comply with a "*request*" from the Office of Self-Regulation. The nature of the word "request" itself implies that acquiescence is not mandatory, even if tribes would generally comply with such a request in the spirit of good faith. Accordingly, we would either recommend altering the language here to provide that 1) that tribes will not unreasonably deny requests from the Office of Self-Regulation, and 2) to eliminate reasonable refusal of a request as grounds for revocation of a certificate of self-regulation.

Moreover, we assert that there is a need to limit the amount of information that the Office of Self-Regulation will request under this section. While "information relevant to any material change in circumstances" affecting a tribe's continued eligibility for self-regulated status may be of use to the NIGC, requiring that tribes also provide "information that may lead to information that is relevant to any material change in circumstances" is overburdensome, unclear, and, most importantly, does not rise to the standard of information that would impact the tribe's continuing ability to self-regulate. Indeed, by requiring the provision of such information, the NIGC would impermissibly adopt for itself regulatory responsibilities that, under law, are to be delegated to the self-regulated tribe.

> ii. "Section 518.13 – The Office of Self-Regulation will become the proponent of any case to revoke a certificate before the Commission, and will provide any recommendation to revoke a certificate to the Commission and the tribe…"

We are concerned that the regulation, as written is vague and presents certain logistical issues. Further, we opposed the deletion of language outlining how the Office of Self-Regulation determines that a tribe "no longer meets or did not comply with the eligibility criteria" for self-regulation. At a minimum the regulation should outline: 1) the information utilized to bring about consideration of such a determination; 2) the process by which information is considered prior to the determination; and 3) the standard for making such a determination – specifically including whether the Commission/Office of Self-Regulation must make the determination by a majority vote, a consensus, or some other factor. This concern is further complicated by the current nature of staffing of the Office of Self-Regulation, which we understand is limited to a single person—the Director and a member of the Commission. We urge the NIGC to assess how to populate or otherwise operate this office in a manner that does not risk offending principles of due process.

Regarding the fact that an active NIGC Commission member serve as Director of the Office of Self-Regulation creates several problems. First, there is a conflict in the context of how the determinations are made to pursue the revocation of a certificate of self-regulation. We are concerned that due process is implicated where the decision maker is acting in the role of "the proponent of any case to revoke a certificate" and also a member of the body deciding whether such proponent has met their burden of proof under § 518.14.

iii. “Section 518.14 – For any revocation case, the Office of Self-Regulation has the burden to show just cause for revocation and must carry that burden by a preponderance of the evidence.”

We find it appropriate to place the burden of proof on the Office of Self-Regulation to show why a tribe’s certificate should be revoked. However, this does not eliminate the conflict discussed previously. Provisions for recusal or some other means of eliminating due process concerns should be further explored.

III. Conclusion

We hope that these comments will be accepted in the collegial spirit with which they are submitted. We appreciate your consideration and hope these comments prove useful to the Commission in determining whether and to what extent revisions to the regulatory provisions discussed herein are warranted.

National Indian Gaming Association

224 2nd Street, SE

Washington, D.C. 20003