



NATIONAL INDIAN GAMING ASSOCIATION

November 10, 2017

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW
Mailstop #1621
Washington, DC 20240

Re: Comments on 25 C.F.R. Part 547 Proposed Rule

Dear Chairman Chaudhuri:

On behalf of the 184 member tribes of the National Indian Gaming Association, I am pleased to submit the following comments regarding the National Indian Gaming Commission's ("NIGC") Proposed Rule of 25 C.F.R. § 547.5 as published in the Federal Register on September 28, 2017.¹ We appreciate the opportunity to review and comment on the Proposed Rule and hope that our comments below prove helpful to the NIGC in promulgating its Final Rule.

We appreciate the NIGC's decision to embrace a consultative process in its update of 25 C.F.R. § 547.5 and commend the NIGC's efforts to engage in robust discussion with tribal governments in developing this Proposed Rule. We further commend the NIGC's acknowledgement that Class II gaming continues to be a vibrant and indispensable economic resource for tribal governments. Indeed, Class II gaming continues to account for a significant portion of the \$31.2 billion in gross revenues now generated by the Indian Gaming industry.² Class II gaming also generates revenues that sustain jobs, funds programs and services critical to tribal and local communities, and strengthens not only tribal economies, but the U.S. economy as a whole.

We are pleased by the NIGC's responsiveness to the many comments it received from Indian Country following the release of the June 14, 2017 Discussion Draft, particularly with regard to the Sunset Provision and certain technical reporting requirements. We agree that a reasonable and workable Class II technical standard will help provide for the continued safe and efficient operation of pre-2008 Class II gaming systems, while at the same time ensure a sound framework for regulatory oversight and verifiable technical compliance. We believe that much of the Proposed Rule serves this shared objective. At the same time, however, we remain concerned that some remaining provisions of the Proposed Rule create undue burdens and are not critical to achieving the Proposed Rule's stated purpose – *i.e.*, to ensure the integrity of Class II games and gaming revenue.³

¹ Technical Standards, 82 Fed. Reg. 45,228 (proposed Sept. 28, 2017).

² Press Release, Nat'l Indian Gaming Comm'n., 2016 Indian Gaming Revenues Increased 4.4% (July 17, 2017), <https://www.nigc.gov/news/detail/2016-indian-gaming-revenues-increased-4.4>.

³ Technical Standards, *supra* note 1 at 45,228.

I. We Strongly Support the Proposal to Repeal the “Sunset Provision” and Remove the Annual Review Reporting Requirement.

We applaud and fully support the NIGC’s proposal to remove the so-called “Sunset Provision” from the Proposed Rule, as it marks a significant departure from the existing requirement that pre-2008 Class II gaming systems must undergo fundamental modifications to meet the NIGC’s Class II technical standard or be removed from operation by November 10, 2018.⁴ Tribal governments and industry technical experts alike have long maintained that there is no regulatory, technical, or practical basis or justification for mandating the removal of pre-2008 gaming systems simply because of their manufacture date.

In nearly a decade since the Sunset Provision was first introduced, there has been no evidence to support the claim that pre-2008 gaming systems somehow pose a threat to the integrity of gaming, the safety of the public, the interests of the Tribes, or the public interest generally. A large number of these gaming systems continue to operate in Indian Country today. These pre-2008 gaming systems and their components continue to be certified by independent testing laboratories, continue to function as designed, continue to play and pay as advertised, and continue to be operated under the primary regulatory jurisdiction of tribal gaming regulatory authorities.

We also support the proposed removal of the annual reporting requirement introduced in the Discussion Draft, as it properly recognizes TGRAs as the primary regulators of tribal gaming under IGRA. However, as discussed below, we have some remaining concerns with the overall annual review process and question whether it will help accomplish the stated regulatory purpose of Part 547.

II. The Proposed Annual Review Requirement is Unnecessary and Burdensome.

The Proposed Rule retains from the Discussion Draft a new mandatory process requiring TGRAs to annually review and assess each pre-2008 Class II gaming system operating within its jurisdiction for compliance with Part 547.5(b).⁵ This new provision requires TGRAs to not only identify specific Class II gaming systems not conforming to Part 547.5(b), but to also enumerate all components of each system that functionally prevent compliance with Part 547.5(b).⁶

However, it should be noted that both the current Rule⁷ and the Proposed Rule⁸ already require TGRAs to review and document lab reports, render technical findings, and issue certifications for pre-2008 Class II gaming systems and their components; and to submit this information to the NIGC. In fact, many TGRAs effectuate these requirements not only as pre-2008 gaming systems are brought into operation, but on an ongoing basis as pre-2008 gaming systems are maintained. In this respect, it would be redundant to require TGRAs to annually re-review testing laboratory reports, reassess all pre-2008 Class II gaming systems and components, and produce what amounts to a restatement of certification opinions that have already been rendered and submitted to the NIGC.

⁴ 25 C.F.R. § 547.5(b)(1) (2012).

⁵ Technical Standards, *supra* note 1, at 45,231 (proposed 25 C.F.R. § 547.5(a)(2)(iii)).

⁶ *Id.*

⁷ 25 C.F.R. § 547.5(b)(2) (2012).

⁸ Technical Standards, *supra* note 1, at 45,231 (proposed 25 C.F.R. § 547.5(a)(1)(v)).

The NIGC has not suggested any specific reasons why the existing system of analysis, certification, and documentation - which has stood for many years - should be amended, nor are we aware of any need for amendment. The preamble to the Proposed Rule does not identify a clear need for the data or demonstrate how this data will be helpful or even used by the NIGC. The proposed new approach to pre-2008 Class II gaming systems should not be adopted absent a strong, factually based demonstration of need for each of the new requirements. Such a need cannot be merely speculative or conjectural, but based on an existing, concrete concern that the information from the annual review will help resolve.

We are not persuaded that a compelling regulatory need for the annual review exists and believe that the current proposal will instead result in excessive regulatory costs and burdens on TGRAs without generating any appreciable regulatory benefits. The process of reviewing all of the components of each individual system, identifying the compliance status of each component within that system, and documenting the modifications necessary for the system to become fully compliant with 547.5(b) will require substantial time and effort and significant expense. Complying with these new requirements would be an expensive burden that could prove cost-prohibitive for those TGRAs already operating under constrained budgets with limited staffing. The increased workload would also divert critical resources away from other more pressing regulatory priorities.

As noted above, the current rules already provide adequate recordkeeping measures for pre-2008 Class II gaming systems. It should also be noted that all gaming systems, including pre-2008 systems, are inventoried, frequently tested, and subject to recording requirements in accordance with tribal internal control standards. If the purpose of the annual review is to better understand the number and status of pre-2008 Class II gaming systems in existence, having the NIGC perform a records review during its on-site compliance visits would be a far more reasonable and less burdensome approach than what now appears in the Proposed Rule.

III. The New Requirement that All Modifications Must Be Tested for Compliance with Part 547 Should Be Removed.

The Proposed Rule also retains from the Discussion Draft the requirement that all modifications to a pre-2008 Class II gaming system must be submitted to a testing laboratory and tested for compliance with *all* technical standards of Part 547, not just those standards provided for pre-2008 systems.⁹ According to the NIGC, this new requirement is necessary to ensure that TGRAs have the information they need to determine whether a modification will maintain or advance compliance.

While we understand the intent behind this proposed new requirement, we wish to point out that there may be instances where testing to the standards applicable to newer systems may be unnecessary and offer no benefit to the TGRA. This proposed new requirement appears to be based on the assumption that all modifications are capable of affecting the compliance status of a pre-2008 gaming system. This is simply not the case. There may be instances where a game modification is known by both the TGRA and the game manufacturer to have no impact as far as

⁹ Technical Standards, *supra* note 1, at 45,232 (Proposed Rule, 25 C.F.R. § 547(c)(2)).

compliance with 547.5(b) is concerned. Under such circumstances, it would be unreasonable to require the TGRA to submit the component for testing against the full standards.

We strongly believe that the decision of whether to test to the full standards should be within the discretion of the TGRA, not mandated in the regulation. This is, indeed, consistent with the primary regulatory role of TGRAs in ensuring the security and integrity of Class II gaming. We question the need for this proposed change given that the existing system for approving modifications has worked well without any significant problems or risks to the integrity of the game.

IV. Conclusion

In closing, we would like to thank the NIGC for this opportunity to share our views and comments on the Proposed Rule of 25 C.F.R. § 547.5. We respectfully seek your favorable consideration of our comments and ask that you carefully consider our views and concerns as you move through the rulemaking process.

Please do not hesitate to contact us if we can provide any additional information.

Sincerely,

A handwritten signature in black ink, reading "Ernest Stevens Jr." with a stylized, cursive script.

Ernest I. Stevens, Jr.
Chairman
National Indian Gaming Association