NATIONAL INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

July 27, 2017

Via Electronic Mail: ***Vannice_Doulou@nigc.gov***

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

Re: Comments on June 14, 2017 Discussion Draft of 25 C.F.R. § 547.5 – 2008 (Grandfathered) Systems

Dear Chairman Chaudhuri:

On behalf of the National Indian Gaming Association, we are pleased to submit the following comments on the proposed revisions contained in the National Indian Gaming Commission's ("NIGC") Discussion Draft of 25 C.F.R. § 547.5 issued on June 14, 2017. We appreciate the opportunity to review and comment on the Discussion Draft during this consultative process and hope that our comments below prove helpful in the deliberations that follow.

We appreciate the NIGC's willingness to consider the concerns that tribal governments have raised in relation to the sunset clause in 25 C.F.R. § 547.5(b)(1). As you know, tribal governments have long maintained that there is no basis or justification for forcing the removal of grandfathered Class II gaming systems from the market, particularly given that in nearly a decade, no evidence has materialized to suggest that such systems pose either an integrity issue or a safety risk to patrons or gaming operations. We support the proposal to remove the sunset clause and are encouraged by the NIGC's willingness to consider a less draconian means to allay any remaining concerns it may have in relation to Class II gaming systems manufactured prior to November 10, 2008.

We have some concerns, however, with certain aspects of the Discussion Draft, which proposes an annual review and reporting scheme that will, in our view, create more burdensome and onerous procedures than those imposed under the current rule. In particular, we have serious concerns with the annual review and reporting procedures in § 547.5(a)(2)(iii) of the Discussion Draft, which will impose unnecessary burdens and costs on tribal gaming regulatory authorities ("TGRAs") without any corresponding regulatory benefit. We find these and the other amendments discussed below to be unnecessary additions to a regulation that has proven to work well in safeguarding the safety and integrity of Class II gaming activities.

I. The Proposed Annual Review and Reporting Procedures Are Unnecessary and Impose Unreasonable Costs and Other Burdens on TGRAs Without Any Sufficient Regulatory Justification.

Section 547.5(a)(2)(ii) of the Discussion Draft sets forth a new mandatory process requiring TGRAs to review and assess each grandfathered system for compliance with Part 547 and report its findings to the NIGC on an annual basis. In the Dear Tribal Leader Letter dated June 14, 2017, the NIGC explains that these new procedures are "designed to identify 2008 Systems in play and what component modifications are necessary for the 2008 System to be brought into full compliance."

We wish to point out, however, that the existing rules already provide for adequate TGRA recordkeeping and reporting requirements, including retention of laboratory reports and certifications,[1] and submission to the NIGC of documentation identifying approved grandfathered Class II gaming system and its components.[2] The NIGC has not suggested any new reasons why the existing recordkeeping system, which has stood for many years, should be amended, nor are we aware of any need for amendment. Moreover, the NIGC has not provided any showing or demonstration of need for the extensive data collection and reporting requirements in the Discussion Draft. Without more information, it is unclear to us why this data is needed and how this data will be helpful or even used by the NIGC.

The failure to provide a reasoned basis or explanation is contrary to basic principles of federal rulemaking. As the Supreme Court reemphasized as recently as 2016, "[f]ederal administrative agencies are required to engage in reasoned decisionmaking."[3] An agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[4] The proposed new approach to grandfathered games 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 exists. Moreover, it appears 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 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

[1] *See* 25 C.F.R. § 547.5(a)(5)-(6).
[2] *See* § 547.5(b)(2).
[3] Michigan v. E.P.A., 135 S. Ct. 2699, 2706 (2015) (citing Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 374 (1998) (internal quotation marks omitted)).
[4] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

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 grandfathered Class II gaming systems. It should also be noted that all gaming systems, including grandfathered systems, are inventoried, periodically tested, and subject to recordation requirements in accordance with tribal internal control standards. If the purpose of the annual review is to better understand the number and status of grandfathered 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 is currently being proposed.

II. The Scope of Class II Gaming Systems Covered Under Proposed § 547.5(a) Is Overly Broad.

As explained in the June 14, 2017 Dear Tribal Leader Letter, the NIGC is proposing to remove all references to "Grandfather" from the regulation and instead refer to all Class II gaming systems manufactured before November 10, 2008 as "2008 Systems." Though well-intended, this proposed change in terminology poses some new problems that will result in unnecessary confusion.

Our concern is with the language used in proposed § 547.5(a)(1), which provides that "[a] TGRA may not permit the use of ***any*** Class II gaming system manufactured before November 10, 2008, in a tribal gaming operation unless" certain requirements have been satisfied. The wording of this provision creates confusion since it could be misinterpreted to mean that ***all*** Class II gaming systems manufactured prior to November 10, 2008, including those that are now fully compliant with Part 547, will be subject to the grandfathering provisions in § 547.5(a). We do not believe this is what the NIGC intended. As the NIGC may be aware, there are numerous grandfathered systems in the marketplace that were either in full compliance on or before November 10, 2008, or have since been brought into full compliance. Since these systems have already been approved as fully compliant, they should not be subject to the requirements in § 547.5(a).

We note that the current rule in § 547.5(a) properly excludes from its scope any Class II gaming systems that no longer qualify for grandfathered status and have become fully compliant with Part 547. To minimize the potential for confusion, it should be clarified that the scope of proposed § 547.5(a) is similarly limited to only those Class II gaming systems manufactured before November 10, 2008 that have not yet been brought into full compliance with Part 547.

III. The New Requirement that All Player Interfaces Have a Date of Manufacture Before November 10, 2008 Should Be Removed.

Section 547.5(a)(viii) of the Discussion Draft requires that all player interface components of grandfathered Class II gaming systems have a date of manufacture before November 10, 2008. The NIGC explains in its June 14, 2017 Dear Tribal Leader Letter that this is simply a reinstatement of a requirement from the original technical standards published in 2008.

First, we note that this is actually a new requirement and that no proposed or published version of the technical standards have ever included limitations or restrictions on the type of player interface that may be used with grandfathered games. In fact, in the preamble to the 2008 Final Rule of the technical standards, the NIGC clarified that grandfathered systems are not "to remain entirely static,"[5] and that the TGRA may permit modifications that increase compliance of the overall system, even if they do not make the whole system fully compliant. In other words, when enacting the technical standards, the NIGC anticipated that certain components of grandfathered systems, including player interfaces, would likely be modified, updated, and used in conjunction with grandfathered games.

Indeed, since 2008, TGRAs have approved various modifications to grandfathered systems, including the use of player interfaces manufactured after November 10, 2008. If implemented, proposed § 547.5(a)(viii) would prohibit tribal operators from utilizing these newer player interfaces with grandfathered systems. In effect, this new requirement would require tribal operators to use old player interfaces even where a new player interface would enhance the system's overall compliance with Part 547. We find this prohibition to be unnecessary, impractical, and counterproductive to the stated goal of incentivizing all systems to move forward towards full compliance.

The NIGC has not provided any reasons or justification for prohibiting the use of newer player interfaces with grandfathered gaming systems. Absent any evidence to suggest that a grandfathered gaming system cannot operate properly utilizing new player interfaces, there is simply no basis for prohibiting the use of player interfaces manufactured after November 10, 2008. Tribal operators should retain the discretion afforded under the current rule to utilize newer technology and gaming equipment, especially if doing so will advance the system's overall compliance, subject, of course, to the oversight of TGRAs.

IV. The New Requirement that All Modifications Have to Be Tested for Compliance with Part 547 Should Be Removed.

The NIGC is seeking to revise the requirements that TGRAs must follow when reviewing and approving modifications to Class II gaming systems. Under the Discussion Draft, all modifications to a Class II gaming system must be submitted to a laboratory and tested for compliance with the full standards of Part 547. Since the relevant provisions in the Discussion Draft do not distinguish between grandfathered and fully compliant systems, it appears that these revisions are intended to apply to all Class II gaming systems, regardless of their compliance status. This means that any modification to a grandfathered system will also have to be tested for compliance with the full standards of Part 547, not just to those applicable to grandfathered systems as is currently required under the existing rule.[6]

This proposed new requirement is unnecessary and will only result in additional costs with no practical benefit. Under the current rule, a grandfathered system can be modified as long as the TGRA determines that the modification will not detract from the system's proper operation or

[5] 73 Fed. Reg. 60508, 60511 (Oct. 10, 2008).
[6] 25 C.F.R. § 547.5(b)(5).

diminish its overall compliance with Part 547.[7] Since a laboratory report is not required for its approval, TGRAs have greater flexibility and control over modifications to grandfathered systems than they do over fully compliant systems under the current rule.

The Discussion Draft seeks to remove this important benefit afforded to TGRAs and impose new requirements that were previously applicable to fully compliant systems only. We question the need for this change given that the existing system for approving modifications has worked well and without any significant problems.

If implemented, this proposed change would remove the important role played by TGRAs in developing an appropriate regulatory scheme to monitor and regulate their Class II grandfathered systems. The NIGC should preserve the flexibility and control given to TGRAs in the current rule as it properly reflects the primary role of tribal governments in ensuring the security and integrity of Class II gaming.

V. Conclusion

In closing, we would like to thank you for this opportunity to share our views and comments on the proposed changes reflected in the Discussion Draft 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,

Ernest L. Stevens, Jr.
Chairman

[7] *See id*.