OFFICE OF THE GOVERNOR
The Chickasaw Nation
Post Office Box 1548 • Ada, Oklahoma 74821
(580) 436-2603 • Fax (580) 436-4287
http://www.chickasaw.net/~cnation

BILL ANOATUBBY
GOVERNOR

March 30, 2012

Ms. Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, DC 20005

Dear Chairwoman Stevens:

The Chickasaw Nation is pleased to submit written comments in response to the Notice of Proposed Rulemaking of 25 C.F.R. Part 518: Self-Regulation of Class II Gaming, which was published in the Federal Register on January 31, 2012. 77 Fed. Reg. 4714. The opportunity to participate in this important consultation process is greatly appreciated.

The National Indian Gaming Commission's effort to amend the self-regulation program in a manner that is consistent with the Indian Gaming Regulatory Act ("IGRA") and the principles of tribal sovereignty is especially appreciated. In the enclosed comments, we offer recommendations for resolving the remaining issues in the proposed rule so that a greater number of tribal governments may take advantage of the statutory benefits of self-regulation.

Thank you for your consideration of the Chickasaw Nation's comments on this important matter. We look forward to continuing to work closely with the NIGC in the spirit of the government-to-government relationship and in accordance with federal law and policy.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

Enclosure

COMMENTS OF THE CHICKASAW NATION ON THE NATIONAL INDIAN GAMING COMMISSION'S NOTICE OF PROPOSED RULEMAKING 25 C.F.R. PART 518 – SELF-REGULATION OF CLASS II GAMING

The Chickasaw Nation offers the following comments in response to the National Indian Gaming Commission's ("NIGC") Notice of Proposed Rulemaking of 25 C.F.R. Part 518, which was published in the Federal Register on January 31, 2012. 77 Fed. Reg. 4714. In our view, a major overhaul of the self-regulation program is long overdue and the current regulatory review process is an excellent opportunity for the NIGC to transform the process by which tribal governments petition for and maintain self-regulation status.

As noted in our September 16, 2011 comments on the preliminary Discussion Draft of 25 C.F.R. Part 518, the Indian Gaming Regulatory Act ("IGRA") and the self-regulation provisions contained therein were enacted at the height of the self-determination era in furtherance of Congress' long-standing policies of promoting strong tribal governance and self-determination. Thus, in an era of federal-tribal relations where tribal self-governance status is commonplace, one might expect that most self-governance tribes with gaming operations, such as the Chickasaw Nation, would make securing self-regulation status a priority. Moreover, being that IGRA vests tribal governments with primary authority over their gaming operations, one might also expect self-regulation to be the norm, not the exception amongst tribal governments.

In practice, however, tribal governments have been reluctant to seek self-regulation status because of the onerous petition requirements, the significant costs in maintaining self-regulation status, and the limited regulatory and oversight benefits that exist under the current regulation. To date, only two tribal governments out of the over 200 tribal governments with gaming operations have received certificates of self-regulation. The program's poor record of success indicates that the program has failed to accomplish what Congress intended when IGRA was enacted, which was to encourage participation in the self-regulation program by rewarding those that operate and regulate Class II gaming on a standard of excellence with less federal oversight. Until the NIGC allows the self-regulation program to function in the manner intended by Congress, tribal governments will continue to be discouraged from exercising their statutory right to attain self-regulation status.

In reviewing our comments below, as well as those submitted by other tribal governments, we urge the NIGC to be mindful of its duty to consult meaningfully with tribal governments. To consult meaningfully, the NIGC must do more than just "listen" to tribal input but actually accommodate tribal issues and concerns to the maximum extent permitted by law, even if it results in wholesale revisions to existing regulations. Only through the implementation of bold and sweeping reforms can a final rule be developed that encourages the greatest number of tribal governments to realize the potential of self-regulation authority as intended by Congress.

General Comments

As noted in our previous comments filed on September 16, 2011, the preliminary Discussion Draft of 25 C.F.R. Part 518 was a significant improvement over the current regulation; however, there were several remaining issues in the Discussion Draft that we believed would benefit from further revision. The Chickasaw Nation is rather disappointed that the proposed rule does not address many of the issues we raised in our comments, particularly with respect to the provisions addressing eligibility requirements and the criteria for receiving a certificate of self-regulation, which we believe are the most problematic areas of the regulation that require the most attention. With the exception of a few minor cosmetic changes, the eligibility and criteria requirements remain largely intact in the proposed rule and thus continue to suffer from the same deficiencies. We urge the NIGC to consider more meaningful changes so that clear objective standards are established in a manner that encourages tribal participation and provides insight and guidance as to how such standards can be achieved.

The Chickasaw Nation is also disappointed that the proposed rule does not adequately resolve what we refer to as the problematic "thumbs up or down" approach to the issuance of a certificate of self-regulation. In the proposed rule, upon finding that the petitioning tribal government has failed to satisfy the criteria requirements for receiving a self-regulation certificate, the NIGC issues a final determination denying the petition which is deemed a final agency action. In the event a hearing is held, the decision of the Commission to deny a petition following the hearing is deemed a final agency action.

Rather than simply issuing denials, the NIGC should focus its efforts on working with the petitioning tribal government over a set period of time so that the tribal government will eventually be accepted into the self-regulation program at a future time. To that end, instead of issuing formal determinations and conducting hearings, the NIGC should adopt a more informal approach involving the use of intergovernmental agreements and meetings so that tribal governments are encouraged to continue striving for self-regulation status. A more flexible and collaborative self-regulation program would advance the regulatory interests of both tribal governments and the NIGC by motivating tribal governments to strengthen their regulatory practices and institutions so that the NIGC can focus its efforts and resources assisting those tribal governments in need of greater oversight.

In sum, we believe that the self-regulation regulation should provide a roadmap for what constitutes a sound, effective regulatory framework so that tribal governments can ultimately succeed in achieving the mutually desirable goal of self-regulation. The changes reflected in the proposed rule are a step in the right direction; however, more meaningful changes are necessary to ensure that the self-regulation program assists the NIGC and tribal governments in achieving the statutory goals established in IGRA. It is our hope that our comments are both helpful and useful in this regard.

Specific Comments

25 C.F.R. § 518.4

As the NIGC acknowledges in the preamble, the current rule requires the submission of information that is more focused on the gaming operation than the gaming regulatory framework. The Chickasaw Nation agrees that the primary objective in revising § 518.5 should be the elimination of any submission requirement that is not directly related to the capacity and strength of a tribal government's regulatory framework. While the Discussion Draft proposed to eliminate several submission requirements, we noted in our previous comments that such changes did not go far enough and that additional revisions were necessary to ensure that each requirement was directly related to the tribal government's capacity for self-regulation.

The Chickasaw Nation is disappointed that the proposed rule still contains several of the requirements that we identified as problematic and irrelevant to a tribal government's capacity for self-regulation.
For instance, proposed § 518.4(c)(v) still requires tribal governments to submit a list of current regulators and employees of the tribal regulatory body, along with their titles, employment dates, and expiration dates. While we understand that information about the structure and specific positions within the tribal regulatory body are relevant in evaluating a petition for self-regulation, we believe the submission requirement of an organizational chart in proposed § 518.4(c)(ii) will provide sufficient information regarding a tribal government's regulatory structure. The NIGC, as the federal body with regulatory oversight of the tribal gaming industry, is not and should not be in a position to evaluate the competence of individual staff members.

In addition, the proposed rule still requires petitioning tribal governments to submit a list of gaming activity internal controls at the gaming operation. As noted in our previous comments, we believe this is an unnecessarily burdensome requirement given the breadth of internal controls applicable to tribal gaming operations. Moreover, it is unclear how a list of internal controls will assist the NIGC in evaluating a tribal government's capacity for self-regulation, especially since a tribal government's Internal Control Standards are evaluated against the NIGC's Minimum Internal Control Standards in a yearly audit submitted to the NIGC. Nothing new would be gained by the NIGC reviewing a list of internal control standards that have already been reviewed by an independent CPA as part of the NIGC's annual audit process.

To ensure that this section fulfills the NIGC's stated objective of requiring only that information necessary to evaluate a tribal government's regulatory capacity, the NIGC should take a deeper look at each of the requirements listed in proposed § 518.4(a)-(c) and eliminate any submission requirement that does not precisely sync with the criteria for obtaining a certificate of self-regulation.

In furtherance of the objective to revise the submission requirements of § 518.4 to eliminate any required submission that does not focus upon a tribal government capacity

for self-regulation, we recommend that the submission requirements of § 518.4(c)v and § 518.4(c)vii be eliminated.

25 C.F.R. § 518.5

In enacting statutes, Congress routinely delegates rulemaking power to federal agencies and empowers agencies such as the NIGC to promulgate rules and standards when implementing a statutory scheme. To that end, Congress often will leave statutory gaps for an agency to fill in a fair and reasonable manner through the rulemaking process. Thus, in developing regulations, agencies must do more than simply restate statutory language; agencies must use the rulemaking process to provide meaningful guidance as to how a statutory scheme will be implemented by the agency.

Proposed § 518.5, which sets out the criteria that a tribal government must meet in order to receive a certificate of self-regulation, remains full of gaps needing to be filled by the NIGC. As noted in our previous comments, the criteria listed in this section are overly subjective and vague and provide little to no guidance as to how a tribal government can meet the criteria. Proposed § 518.5 simply restates the statutory criteria in § 2710(c)(4)(A)-(C) of IGRA without defining or clarifying how terms such as "safe, fair, and honest"; "generally free"; "adequate systems"; and "fiscally and economically sound" will be interpreted by the NIGC during the approval process. Such terms are overly subjective and thus give the NIGC tremendous discretion in deciding whether to approve a petition, which in turn increases the risk of arbitrary and capricious decision-making, as well as inconsistencies in the certification process.

In our view, the purpose of this section should be two-fold: first, to provide guidance as to what these terms mean so that tribal governments understand how to meet the criteria, and second, to reasonably constrain the NIGC's discretion with regard to its approval process. As drafted, the proposed rule accomplishes neither of the above purposes. In considering additional amendments to this section, we urge the NIGC to include more straightforward, objective factors that will bring greater clarity and consistency to this regulation. For instance, the NIGC could require tribal governments to show three years' worth of clean audits free of any material findings to demonstrate that it has "conducted its gaming activity in a manner that has resulted in an effective and honest accounting of all revenues." To show that the tribal government's gaming activities have been "generally free of evidence of criminal or dishonest activity," there are a number of concrete factors that could be elicited by certification by the tribal gaming regulatory agency that the operation: 1) maintains a robust system to detect and preclude money laundering activities pursuant to Title 31 of the United States Code; 2) maintains a system designed to ensure the exclusion of unsavory persons from the gaming facility; and 3) effectively deals with any suspected criminal activity relative to employees, customers, and vendors through referral to the appropriate law enforcement agency for investigation and prosecution.

In addition to being overly subjective and vague, this section also imposes additional requirements that go beyond the criteria set forth in IGRA. For instance,

proposed § 518.5(a)(3) requires tribal governments to have "conducted its gaming activity in compliance with the IGRA, NIGC regulations in this chapter, and the tribe's gaming ordinance and gaming regulations." Taken to its logical extreme, this language suggests that a tribal government must demonstrate that it has been in absolute and perfect compliance with all applicable federal and tribal laws and regulations during the requisite 3-year period in order to qualify for self-regulation. The IGRA, however, does not require absolute compliance with federal and tribal laws and regulations as a condition to receiving a self-regulation certificate. In fact, a plain reading of the statutory criteria contained in IGRA indicates that Congress did not intend for the NIGC to impose an unattainable standard of perfection. If Congress had so intended, it would have included terms such as "absolutely" and "completely" rather than "generally free" and "adequate" in the criteria provided in the statute.

Also, the long set of indicators in proposed § 518.5(b)(1)-(9) impose requirements that we believe impermissibly exceed the criteria set forth in IGRA. As an initial matter, if this section is going to include this list of "factors," it should be clear that this list is not intended to imply that all such factors must be met or addressed in order to meet the criteria. As drafted, it appears as though a tribal government's petition can be denied if at least one of the "factors" is not present. This is especially problematic since some of the listed "factors" are irrelevant to the self-regulation criteria and thus beyond the scope of the criteria set forth in IGRA. For instance, the establishment of standards for issuing vendor licenses is listed as one of the "factors," even though the licensing of vendors is not required under IGRA or the NIGC's regulations. The only licensing requirements under IGRA are in relation to key employees and primary management officials. The licensure of vendors is either solely within the discretion of tribal governments or a requirement established by compact provisions.

Also, the reference to the term "vendor licensing" is too broad for use as a factor in judging the merits of a tribal government's regulatory capacity. A tribe need not license every person or entity with which it does business to have an effective system for screening out undesirable or unsuitable suppliers of goods and services. In fact few, if any, state jurisdictions require licensure by all vendors because most transactions pose little risk of criminal infiltration or other harms. Accordingly, most jurisdictions limit vendor licensure only to gaming and gaming related vendors and may require only a registration or permitting process for non-gaming vendors and/or may establish a monetary threshold before licensure is required. All of these approaches represent reasonable methodologies for ensuring an adequate system of regulation is in place. In sum, an "adequate system" is one in which reasonable standards and procedures are in place to eliminate to the extent practicable the risk of fraud, waste, abuse in the course of business without creating unnecessary costs and hardships on the conduct of business.

25 C.F.R. § 518.7

While we appreciate the NIGC's efforts to streamline the review process, the basic deficiencies in the review process have not been fully resolved in the proposed rule. Specifically, the proposed rule fails to adequately address the rigid approval or denial

approach to reviewing petitions, which we believe is one of the major shortcomings of the current regulation. The review and certification process should be informal and collaborative so that tribal governments are encouraged to continue striving for certification. The process outlined in the proposed rule, however, consists of formal proceedings and the issuance of determinations, all of which culminate in a final determination that is deemed a final agency action.

The Chickasaw Nation objects to the designation of final determinations as "final agency actions" of the NIGC, as such designation either ends the matter or sets up an adversarial process of appeal, thereby foreclosing the possibility of further collaborative efforts. Thus, a petitioning tribal government whose petition has been denied is prohibited from continuing its efforts unless it is successful in its appeal of the NIGC's decision. However, if a tribal government is sufficiently motivated to seek a certificate of self-regulation, it stands to reason that it is sufficiently motivated to make any necessary improvements to secure the certificate ultimately. The review process should not be set up to shut out petitioners from the application process in the event of a denial. We believe such a review process is contrary to the overall mission of the self-regulation program, which is to motivate tribal governments to invest in the development and implementation of strong, comprehensive regulatory frameworks so that the NIGC can confidently carry out its functions with minimum oversight.

Thus, the Chickasaw Nation recommends the removal of proposed § 518.7(f), which designates final determinations as final agency action and the inclusion of additional procedures that will allow for a more informal and collaborative process. For instance, the procedures for issuing preliminary determinations could be replaced with procedures for developing and entering into intergovernmental agreements that identify deficiencies and outline the steps necessary to attain self-regulation status. Also, the hearings procedures could be replaced with procedures for meetings in which the NIGC and the petitioning tribal government informally discuss perceived shortfalls in the petition and how such shortfalls can be remedied to the NIGC's satisfaction. Informal meetings are preferable to formal proceedings such as hearings as they are less adversarial and more conducive to collaboration and problem-solving.

And finally, to streamline the review and certification process, we would recommend removing proposed § 518.7(g), which allows tribal governments to "withdraw its petition and resubmit it at any time prior to the issuance of the Commission's final determination." Tribal governments should only have to submit their petitions once; any information or documentation provided in response to identified deficiencies in the petition should be submitted as supplemental materials to the petition. In this way, the entire petition would not have to undergo the same initial review process by the Office of Self-Regulation. The NIGC would simply review the supplemental materials to verify that the identified deficiencies have been adequately resolved. If the NIGC finds remaining issues in the petition, such issues could similarly be resolved through additional supplementary submissions.

25 C.F.R. § 518.10

The Chickasaw Nation is pleased by the NIGC's proposal to amend the annual submission requirements to more accurately reflect the annual submission requirements under IGRA. Specifically, we are highly supportive of the proposed changes to eliminate the controversial reporting requirement of a tribal government's usage of its net gaming revenues, which had a chilling effect on tribal governments interested in attaining self-regulation status. The Chickasaw Nation is also supportive of the proposed change in § 518.10(a)(2) to narrow the scope of employees covered under this section to include only those employees working for the tribal regulatory body. Any concerns that the NIGC may have regarding key employees and primary management officials should be addressed through the background investigation and licensing procedures set forth in other parts of the regulation.

The Chickasaw Nation would, however, like to bring to the NIGC's attention a technical error in this section that should be corrected in future drafts. Specifically, proposed § 518.10 requires as part of the annual submission, complete résumés for all employees of the tribal regulatory body hired and *licensed* by the tribe. In practice, employees of tribal regulatory bodies typically, are screened and subject to background investigations, but, unless otherwise provided by tribal law, are not "licensed" as that term is used in IGRA because regulators do not fit within the meaning of the terms "key employee" or "primary management official." To avoid any confusion, the word "licensed" should be removed from this section as it is an inaccurate characterization of regulatory officials.

25 C.F.R. § 518.11

In this section, the NIGC is proposing to amend the timeframe within which a tribal government must notify the NIGC of any material changes from the more general timeframe of *immediately* to the more specific timeframe of *three business days*. We believe this provision raises a few issues that warrant further review and revision. First, it is unclear how this change will benefit either the tribal government or the NIGC. In our view, the general term of "immediately" is a more reasonable timeframe than "three business days," as it is broad enough to give tribal governments an opportunity to resolve any issues on their own before reporting them to the NIGC. And second, some of the examples of circumstances that may trigger this notification requirement are problematic as they do not directly relate to the criteria for self-regulation or the tribe's regulatory capacity. For instance, a change in management contractor is not only irrelevant to the criteria for receiving a self-regulation certificate, but it is also information that the NIGC already has in its possession since the NIGC conducts background investigations for management contractors. Also, use of the term "financial instability" is problematic in that it is overly subjective and vague and wholly unrelated to a tribal government's capacity for self-regulation.

Conclusion

In closing, we would like to commend the NIGC for its efforts to strengthen the government-to-government relationship with tribal governments through this regulatory review process. The Chickasaw Nation believes that the self-regulation program is an excellent mechanism for achieving the statutory objectives set forth in IGRA, and we look forward to working with the NIGC in developing regulations that will support meaningful self-regulation by tribal governments.