FinCEN's Guidance on Determining Whether Tribally Owned and Operated Casinos are Eligible for Exemption From CTR Requirements Under 31 C.F.R. §103.22(d)(2)

FinCEN receives numerous questions from depository institutions regarding the applicability of exemptions from filing Currency Transaction Reports (CTRs) for tribally owned and operated casinos in accordance with the Bank Secrecy Act (BSA), 31 U.S.C. §5311 et seq., and its implementing regulations, found in 31 C.F.R. §103.22. The following guidance addresses this issue.

Exemption for Department or Agency of the Government

Under the CTR exemption regulations, a depository institution may exempt the transactions of a "department or agency of the United States, of any State, or of any political subdivision of any State" from the CTR reporting requirement. 31 C.F.R. §103.22(d)(2)(ii). For purposes of BSA regulations, the term "United States" includes Indian lands. See 31 C.F.R. §103.11(nn). Therefore, a transaction conducted by a tribe, or by a department or agency of a tribe, on its own behalf, is eligible for exemption. It should be noted that a transaction carried out by an exempt person as an agent of another person who is the beneficial owner of the funds involved in the transaction is not eligible for exemption. See 31 C.F.R. §103.22(d)(7).

Whether a casino (or any other commercial operation of a tribe) is eligible for CTR exemption as a department or agency of a tribe depends upon the manner in which it is organized and operated. If a bank can determine that the tribal casino is wholly-owned and operated by a tribe, it may exempt reportable transactions conducted by that casino by filing the appropriate paperwork to establish an exemption. (The provision prohibiting banks from treating businesses deriving more than 50% of gross revenues from gaming activity found in 31 C.F.R. §103.22(d)(6)(viii) only applies in the context of granting exemptions to non-listed businesses pursuant to 31 C.F.R. §103.22(d)(2)(vi), and thus does not prohibit banks from exempting a tribal casino that is determined to be a department or agency of a tribe.). However, if a tribal casino is operated by a non-tribal management company or by an independently-owned and operated corporation in which the tribe is a shareholder, the tribal casino would not qualify as an agency or instrumentality of the tribal government, and thus, would not be eligible for treatment as an exempt person.

There may be instances where the operational responsibilities of a tribal casino are shared between the government entity (tribe) and non-tribal management companies. In order to exempt a tribal casino in this circumstance under 31 C.F.R. §103.22 (d)(2)(ii)-(iii), a depository institution needs to determine whether a particular tribal casino operated by a non-tribal management company is an agency or instrumentality of the tribe based on the degree to which a tribal entity oversees the operation of the casino and the work of the

management company. In such situations, a depository institution should consider the following kinds of factors: (i) the nature of any contract into which the tribe has entered with respect to management and operation of the casino; (ii) the composition of casino management; (iii) the presence of tribal officials during day-to-day operations; and (iv) the degree of input a tribal entity provides with respect to regulatory compliance programs.

09/02