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X. References

The following reference has been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. General and Plastic Surgery Devices Panel, Transcript, August 25 and 26, 2005, pp. 11 through 58 of the August 26, 2005, transcripts.

List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, FDA proposes to amend 21 CFR part 878 as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

1. The authority citation for 21 CFR part 878 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 3601, 371.

2. Add § 878.3600 to subpart D to read as follows:

§ 878.3600 Tissue expander.

(a) *Identification.* A tissue expander is a device intended for temporary (less than 6 months) subdermal implantation to stretch the skin for surgical applications, specifically to develop surgical flaps and additional tissue coverage. It is made of an inflatable silicone elastomer shell filled with Normal Physiological Saline (injection grade).

(b) *Classification.* Class II (special controls). The special control for this device is FDA's guidance document entitled "Class II Special Controls Guidance Document: Tissue Expander." See § 878.1(e) for availability information of guidance documents.

Dated: December 16, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

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DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502, 514, 531, 533, 535, 537, 539, 556, 558, 571, 573

RIN 3141-0001

Amendments to Various National Indian Gaming Commission Regulations

AGENCY: National Indian Gaming Commission (NIGC or Commission).

ACTION: Proposed rules.

SUMMARY: The proposed rule modifies various Commission regulations to reduce reporting burdens on tribes, update costs for background investigations, clarify definitions and regulatory intent, and update audit requirements to consolidate and reflect industry standards.

DATES: Submit comments on or before February 5, 2009.

ADDRESSES: Comments can be faxed, mailed, or e-mailed. Mail comments to "Comments on Administrative Regulations," National Indian Gaming Commission, 1441 L St., NW., Washington, DC 20005, Attn: Rebecca Chapman, Office of General Counsel. Comments may be faxed to 202-632-7066 (not a toll-free number). Comments may be sent electronically to adminregs@nigc.gov.

FOR FURTHER INFORMATION CONTACT: Rebecca Chapman, Staff Attorney, Office of General Counsel, at (202) 632-7003; fax (202) 632-7066 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA or Act), 25 U.S.C. 2701-21, creating the National Indian Gaming Commission (NIGC or Commission) and developing a comprehensive framework for the regulation of gaming on Indian lands. 25 U.S.C. 2702. The NIGC was granted, among other things, regulatory oversight and enforcement authority, including the authority to monitor tribal compliance with IGRA, NIGC regulations, and tribal gaming ordinances.

The Commission has worked under IGRA for almost twenty years, and in 1992, it adopted regulations. 25 U.S.C. 2706(b)(10). To better carry out its statutory duties, the Commission undertakes this collection of minor, miscellaneous regulation changes. The proposed rule will update regulations, and it will streamline and optimize existing procedures.

II. Development of the Proposed Rules Through Written Tribal Consultation

The Commission identified a need for minor changes to various parts of its regulations, and in accordance with its government-to-government consultation policy (69 FR 16,973 (Mar. 31, 2004)), requested input from Indian tribes. On March 26, 2007, the Commission prepared amendments to the regulations and sent a copy to the leaders of all gaming tribes for comment. Fifty-seven tribes provided written comments. The NIGC carefully reviewed all comments, often incorporating suggested changes.

In addition, the NIGC consulted with tribes and their gaming commissions at regional gaming association meetings around the country and at the Washington, DC, headquarters. Since March 26, 2007, the NIGC has held consultations at fifteen regional gaming conferences and consulted with more than 110 tribes when the proposed rule was on the agenda. Other than the previous 57 submissions, no tribes chose to consult or comment further about these miscellaneous regulation changes.

III. Purpose and Scope

The changes in this proposed rule are minor but provide incremental improvements to existing regulations. These changes clarify existing regulations, reduce tribal reporting burdens for fees, update costs for background investigations, and allow tribes to consolidate audits and/or file shortened versions to reduce costs. The proposed rule is discussed below.

A. Definitions

NIGC regulations define "key employee" at 25 CFR 502.14. The jobs listed for key employees are, among other things, subject to a background investigation as a condition of licensure. The proposed rule would reflect the common practice of tribes that identify additional employees as key employees subject to background investigations beyond those positions identified in IGRA. NIGC has received no comments on this change.

IGRA and NIGC regulations define "net revenue" as "gross gaming revenues of an Indian gaming operation

less amounts paid out as, or paid for, prizes; and total gaming-related operating expenses, excluding management fees.” 25 U.S.C. 2703(9); 25 CFR 502.16. The proposed rule would amend 25 CFR 502.16 to read:

Net Revenues means gross gaming revenues of an Indian gaming operation less—

(a) Amounts paid out as, or paid for, prizes; and

(b) Total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees.

The proposed rule would reflect the industry understanding of what constitutes an operating expense in order to clarify what constitutes net revenues for a gaming operation.

The Commission accepted the suggestion of a number of commenters to include the words “gaming-related” in order to make clear that the Commission’s jurisdiction extended only to gaming revenues. Thus, the proposed rule reflects this suggestion.

The NIGC’s regulations define a “person having a direct or indirect financial interest in a management contract” to include:

(d) When a corporation is a party to a management contract, any person who is a director or who holds at least 10% of the issued and outstanding stock alone or in combination with another stockholder who is a spouse, parent, child or sibling; or * * *

25 CFR 502.17(d). The proposed rule would lower the requisite financial interest to five percent for publicly traded companies so as to be consistent with the Securities and Exchange Commission’s understanding of a “significant shareholder.” The Commission also notes that this change would be consistent with similar requirements in other gaming jurisdictions.

One comment from a tribe stated that this part of the proposed rule created too onerous a burden on tribes. However, the NIGC disagrees and feels that lowering the requisite interest would best protect the integrity of Indian gaming.

NIGC regulations define “primary management official” at 25 CFR 502.19. The jobs listed for primary management officials are, among other things, subject to a background investigation as a condition of licensure. The proposed rule would reflect the common practice of tribes that identify additional employees as primary management officials subject to background investigations beyond those positions

identified in IGRA. NIGC has received no comments on this change.

B. Annual Fees Required

IGRA requires the NIGC to set an annual funding rate. 25 U.S.C. 2717. NIGC implements this requirement under 25 CFR part 514, which requires tribal submissions of fees four times per year. The proposed rule would reduce the number of fee submissions by half. The proposed rule would also incorporate suggested changes by some tribal commenters that noted inconsistencies in language over when to set fee rates and when to adjust schedules.

C. Content of Management Contracts

IGRA and NIGC regulations require specific provisions in a management contract, and its accompanying submission package, before the Chairman can approve it. 25 U.S.C. 2711; 25 CFR 531.1, 533.3. The Chairman must also approve any amendment to a management contract. 25 CFR 535.1, 535.3. In applying for approval, all persons having a financial interest in, or management responsibility for, a management contract must be disclosed to the Commission and must undergo a background investigation. 25 CFR 537.1. Management contractors must pay for this investigation. 25 CFR 537.3. If the Chairman disapproves a management contract or amendment, the tribe or contractor may appeal. 25 CFR 539.1, 539.2.

The proposed rule would update 25 CFR 531.1, 533.1, 533.3, and 533.7 by removing language regarding the Secretary of the Interior’s approval of management contracts. Because the Secretary no longer fulfills that role, the NIGC is eliminating unnecessary references in §§ 531.1, 533.1, 533.3, and 533.7 to the Secretary’s former authority. Further, section 533.5 permits the Chairman to take action on noncompliant management contracts previously approved by the Secretary. Because no management contracts approved by the Secretary remain active, section 533.5 is obsolete and would be removed.

Additionally, the proposed rule would update § 533.3 to reflect the existing practice of providing a legal description for the land upon which the gaming facility operates or will operate. This practice allows the Commission to determine whether a management contract references a site that is “Indian lands” eligible for gaming as required under IGRA.

The proposed rule would change § 537.3 to increase the fee for

background investigations. This would update the fee and make it closer to actual industry costs.

Finally, the proposed rule would replace the words “modification” and “modify” with “amendment” and “amend” in §§ 535.1, 535.3, 539.1, and 539.2 for purposes of internal consistency.

The only substantive comment received on proposed changes to these sections came from a tribe that objected to the addition of a legal description in the management contract submission package. As the amendment merely reflects existing practice, the Commission will propose the change.

D. Background and Licensing for Primary Management Officials and Key Employees

IGRA requires that tribes, through their gaming ordinances, maintain an adequate system of background investigations. 25 U.S.C. 2710(b)(2)(F). NIGC regulations, 25 CFR parts 556 and 558, implement this requirement. The proposed rule would remove language in 25 CFR 556.2, 556.3 and 558.2 referring to the employment of individuals as key employees and primary management officials and replace it with language referring to their licensure instead. A decision to license an applicant and a decision about an applicant’s suitability (or eligibility) for licensure are separate and distinct from a decision to hire the applicant. These sections are concerned with licensure and suitability determinations, not employment decisions. The NIGC received tribal comments that approved of these changes.

These changes have implications for the use and distribution of gaming application information for key employees and primary management officials. As stated in the notice required by the proposed 25 CFR 556.2, application information may be “disclosed * * * in connection with the issuance, denial, or revocation of a gaming license * * *.” As such, the information could not, without otherwise complying with the requirements of the Privacy Act, 5 U.S.C. 552a, be provided to support employment decisions by prospective or current employers of the license applicant. This is a change from prior practice. Under the NIGC’s existing regulations, application information can be disclosed in connection with the hiring and firing of an employee.

Finally, the amendments to 25 CFR 556.2, 556.3 and 558.2 will have implications for tribal gaming ordinances, but not immediately. Upon

the effective date, tribes do not have to immediately amend their gaming ordinances. However, following the effective date, whenever tribes amend their gaming ordinances, they must also make amendments conforming to the language in these sections.

E. Monitoring and Investigating

IGRA requires ordinances submitted for the Chairman's review to contain a provision requiring an annual audit. 25 U.S.C. 2710(b)(2). The NIGC's regulation, 25 CFR 571.12, creates standard procedures for the submission of the annual audit to the Commission, and § 571.13 deals with how and when a tribe submits an audit statement. The proposed rule would still require tribes to contract with independent certified public accountants that use Generally Accepted Accounting Principles and Generally Accepted Accounting Standards to complete their audits. However, the proposed rule would allow tribes with multiple facilities to consolidate their audit statements into one. Further, the proposed rule would allow operations earning less than \$1 million in gross gaming revenue to file an abbreviated statement. Finally, the proposed rule would allow a tribe to submit an electronic version of an audit for so called "stub periods" of less than 1 year. The proposed rule would reflect common sense practice and reduce tribal costs and burden hours.

Tribal commenters supported the proposed rule's new consolidated audit statements but noted inconsistencies with accounting language and a misuse of accounting terms. The Commission agreed and modified the proposed rule to reflect standard practice and a proper use of accounting terms.

Tribal commenters also objected to the requirement of stub period audits under § 571.13 as burdensome. The proposed rule therefore would permit tribes to incorporate stub period audit information in the next fiscal year financial statement. This would alleviate any cost and time concerns.

NIGC regulation 25 CFR 573.6 discusses the Chairman's ability to close a gaming operation for any listed substantial IGRA violation. The proposed rule would add one substantial violation to the list and allow the Chairman to issue a temporary closure order for a gaming operation that operates on Indian land not eligible for gaming under IGRA. Indian gaming under IGRA must occur on "Indian lands," 25 U.S.C. 2710(a), (b) and (d), as IGRA defines that term. 25 U.S.C. 2703(4). If Indian land is trust land acquired after October 17, 1988 ("after-acquired land"), then the land is eligible

for gaming only if it meets one of the exceptions provided in 25 U.S.C. 2719. A gaming operation that operates on after-acquired land and does not meet one of the exceptions in § 2719 is in violation of IGRA. Operating illegally in this way is a substantial violation of IGRA that warrants immediate closure. The NIGC has not received comments on this part of the proposed rule.

Regulatory Matters

Regulatory Flexibility Act

Because the proposed rule would make only minor changes to existing rules, it will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an annual effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, local government agencies, or geographic regions. Nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1). Regardless, the proposed rule does not impose an unfunded mandate on state, local, tribal governments, or on the private sector of more than \$100 million per year. Thus, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the proposed rule does not unduly burden the judicial system, and it meets the requirements of section 3(a) and 3(b)(2) of that order.

National Environmental Policy Act

The Commission has determined that the proposed rule does not constitute a

major federal action significantly affecting the quality of the human environment and no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

Paperwork Reduction Act

The proposed rule does not require any significant changes in information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The information collections in the affected regulations are included within OMB control numbers 3141-0001 for part 571; 3141-0003 for parts 556 and 558; 3141-0004 for parts 531, 533, 535, 537, 539; and 3141-0007 for part 514.

List of Subjects in 25 CFR Parts 502, 514, 531, 533, 535, 537, 539, 556, 558, 571

Gambling, Indians-lands, Indians—tribal government, Reporting and recordkeeping requirements.

Text of the Proposed Rules

For the reasons set forth in the preamble, the Commission proposes to amend its regulations at 25 CFR Chapter III as follows:

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2701 *et seq.*

2. Add new paragraph (d) to § 502.14 to read as follows:

§ 502.14 Key employee.

* * * * *

(d) Any other person designated by the tribe as a key employee.

3. Revise § 502.16 to read as follows:

§ 502.16. Net revenues.

Net revenues means gross gaming revenues of an Indian gaming operation less—

(a) Amounts paid out as, or paid for, prizes; and

(b) Total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees.

4. Revise § 502.17 to read as follows:

§ 502.17 Person having a direct or indirect financial interest in a management contract.

Person having a direct or indirect financial interest in a management contract means:

(a) When a person is a party to a management contract, any person having a direct financial interest in such management contract;

(b) When a trust is a party to a management contract, any beneficiary or trustee;

(c) When a partnership is a party to a management contract, any partner;

(d) When a corporation is a party to a management contract, any person who is a director or who holds at least 5% of the issued and outstanding stock alone or in combination with another stockholder who is a spouse, parent, child or sibling when the corporation is publicly traded or the top ten (10) shareholders for a privately held corporation;

(e) When an entity other than a natural person has an interest in a trust, partnership or corporation that has an interest in a management contract, all parties of that entity are deemed to be persons having a direct financial interest in a management contract; or

(f) Any person or entity who will receive a portion of the direct or indirect interest of any person or entity listed above through attribution, grant, pledge, or gift.

5. Add new paragraph (d) to § 502.19 to read as follows:

§ 502.19 Primary management official.

* * * * *

(d) Any other person designated by the tribe as a primary management official.

6. The authority citation for part 514 continues to read as follows:

Authority: 25 U.S.C. 2706, 2708, 2710, 2717, 2717a.

7. Revise § 514.1 to read as follows:

§ 514.1 Annual fees.

(a) Each gaming operation under the jurisdiction of the Commission shall pay to the Commission annual fees as established by the Commission. The Commission, by a vote of not less than two of its members, shall adopt the rates of fees to be paid.

(1) The Commission shall adopt preliminary rates for each calendar year no later than February 1st of that year, and, if considered necessary, shall modify those rates no later than July 1st of that year.

(2) The Commission shall publish the rates of fees in a notice in the **Federal Register**.

(3) The rates of fees imposed shall be—

(i) No more than 2.5 percent of the first \$1,500,000 (1st tier), and

(ii) No more than 5 percent of amounts in excess of the first \$1,500,000 (2nd tier) of the assessable gross revenues from each gaming operation

subject to the jurisdiction of the Commission.

(4) If a tribe has a certificate of self-regulation, the rate of fees imposed shall be no more than .25 percent of assessable gross revenues from self-regulated class II gaming operations.

(b) For purposes of computing fees, assessable gross revenues for each gaming operation are the annual total amount of money wagered on class II and III games, admission fees (including table or card fees), less any amounts paid out as prizes or paid for prizes awarded, and less an allowance for amortization of capital expenditures for structures.

(1) Unless otherwise provided by the regulations, generally accepted accounting principles shall be used.

(2) The allowance for amortization of capital expenditures for structures shall be either the greater of:

(a) An amount not to exceed 5% of the cost of structures in use throughout the year and 2.5% (two and one-half percent) of the cost of structures in use during only a part of the year; or

(b) An amount not to exceed 10% of the cost of the total amount of amortization depreciation expenses for the year.

(3) Examples of computations follow:

(a) For (2)(a):

Gross gaming revenues:		
Money wagered		\$1,000,000
Admission fees	\$5,000	1,005,000
Less:		
Prizes paid in cash	500,000	
Cost of other prizes awarded	10,000	510,000
Gross gaming profit		495,000
Less allowance for amortization of capital expenditures for structures:		
Capital expenditures for structures made in—		
Prior years	750,000	
Current year	50,000	
Maximum allowance:		
\$750,000 × .05 =	37,500	
\$50,000 × .025 =	1,250	38,750
Assessable gross revenues		456,250

(b) For (2)(b):

Gross gaming revenues:		
Money wagered		\$1,000,000
Admission fees	\$5,000	1,005,000
Less:		
Prizes paid in cash	500,000	
Cost of other prizes awarded	10,000	510,000
Gross gaming profit		495,000
Allowance (depreciation expense for structures) per books	40,000	
Capital expenditures for structures:		
Capital expenditures for structures made in		
Prior years	750,000	
Current year	50,000	
Maximum allowance:		
\$750,000 × .05 =	37,500	
\$50,000 × .025 =	1,250	
Total maximum allowance	38,750	
Lesser of depreciation per books or maximum allowance		38,750
Assessable gross revenues		456,250

(4) All class II and III revenues from gaming operations are to be included.

(c) Each gaming operation subject to the jurisdiction of the Commission and not exempt from paying fees pursuant to the self-regulation provisions shall file with the Commission a statement showing its assessable gross revenues for the previous calendar year.

(1) These statements shall show the amounts derived from each type of game, the amounts deducted for prizes, and the amounts deducted for the amortization of structures;

(2) These statements shall be transmitted to the Commission to arrive no later than March 1st and August 1st of each calendar.

(3) The statements shall identify an individual or individuals to be contacted should the Commission need to communicate further with the gaming operation. The telephone numbers of the individual(s) shall be included.

(4) Each gaming operation shall determine the amount of fees to be paid and remit them with the statement required in paragraph (c) of this section. The fees payable shall be computed using—

(i) The most recent rates of fees adopted by the Commission pursuant to paragraph (a)(1) of this section,

(ii) The assessable gross revenues for the previous calendar year as reported pursuant to this paragraph, and

(iii) The amounts paid and credits received during the year.

(5) Each statement shall include the computation of the fees payable, showing all amounts used in the calculations. The required calculations are as follows:

(i) Multiply the previous calendar year's 1st tier assessable gross revenues by the rate for those revenues adopted by the Commission.

(ii) Multiply the previous calendar year's 2nd tier assessable gross revenues by the rate for those revenues adopted by the Commission.

(iii) Add (total) the results (products) obtained in paragraphs (c)(5) (i) and (ii) of this section.

(iv) Multiply the total obtained in paragraph (c)(5)(iii) of this section by $\frac{1}{2}$.

(v) The amount computed in paragraph (c)(5)(iv) of this section is the amount to be remitted.

(6) Examples of fee computations follows:

(i) Where a filing is made for March 1st of the calendar year, the previous year's assessable gross revenues are \$2,000,000, the fee rates adopted by the Commission are 0.0% on the first \$1,500,000 and .08% on the remainder, the amounts to be used and the computations to be made are as follows:

1st tier revenues—\$1,500,000 × 0.0%=	
2nd tier revenues—\$500,000 × .08%=	\$400
Annual fees	400
Multiply for fraction of year— $\frac{1}{2}$ or	.50
Fees for first payment	200
Amount to be remitted	200

(7) The statements, remittances and communications about fees shall be transmitted to the Commission at the following address: Office of Finance, National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington, DC 20005. Checks should be made payable to the National Indian Gaming Commission (do not remit cash).

(8) The Commission may assess a penalty for failure to file timely a statement.

(9) Interest shall be assessed at rates established from time to time by the Secretary of the Treasury on amounts remaining unpaid after their due date (31 U.S.C. 3717).

(d) The total amount of all fees imposed during any fiscal year shall not exceed the statutory maximum imposed by Congress. The Commission shall credit pro-rata any fees collected in excess of this amount against amounts otherwise due by March 1st and August 1st of each calendar year.

(e) Failure to pay fees, any applicable penalties, and interest related thereto may be grounds for:

(1) Closure, or

(2) Disapproving or revoking the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

(f) To the extent that revenue derived from fees imposed under the schedule established under this paragraph are not expended or committed at the close of any fiscal year, such funds shall remain available until expended (Pub. L. 101–121; 103 Stat. 718; 25 U.S.C. 2717a) to defray the costs of operations of the Commission.

8. The authority citation for part 531 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

9. Revise § 531.1 to read as follows:

§ 531.1 Required provisions.

Management contracts shall conform to all of the requirements contained in this section in the manner indicated.

(a) *Governmental authority.* Provide that all gaming covered by the contract will be conducted in accordance with the Indian Gaming Regulatory Act (IGRA, or the Act) and governing tribal ordinance(s).

(b) *Assignment of responsibilities.* Enumerate the responsibilities of each

of the parties for each identifiable function, including:

(1) Maintaining and improving the gaming facility;

(2) Providing operating capital;

(3) Establishing operating days and hours;

(4) Hiring, firing, training and promoting employees;

(5) Maintaining the gaming operation's books and records;

(6) Preparing the operation's financial statements and reports;

(7) Paying for the services of the independent auditor engaged pursuant to § 571.12 of this chapter;

(8) Hiring and supervising security personnel;

(9) Providing fire protection services;

(10) Setting advertising budget and placing advertising;

(11) Paying bills and expenses;

(12) Establishing and administering employment practices;

(13) Obtaining and maintaining insurance coverage, including coverage of public liability and property loss or damage;

(14) Complying with all applicable provisions of the Internal Revenue Code;

(15) Paying the cost of any increased public safety services; and

(16) If applicable, supplying the National Indian Gaming Commission (NIGC, or the Commission) with all information necessary for the Commission to comply with the regulations of the Commission issued pursuant to the National Environmental Policy Act (NEPA).

(c) *Accounting.* Provide for the establishment and maintenance of satisfactory accounting systems and procedures that shall, at a minimum:

(1) Include an adequate system of internal accounting controls;

(2) Permit the preparation of financial statements in accordance with generally accepted accounting principles;

(3) Be susceptible to audit;

(4) Allow a gaming operation, the tribe, and the Commission to calculate the annual fee under § 514.1 of this chapter;

(5) Permit the calculation and payment of the manager's fee; and

(6) Provide for the allocation of operating expenses or overhead expenses among the tribe, the tribal gaming operation, the contractor, and any other user of shared facilities and services.

(d) *Reporting.* Require the management contractor to provide the tribal governing body not less frequently than monthly with verifiable financial reports or all information necessary to prepare such reports.

(e) *Access.* Require the management contractor to provide immediate access to the gaming operation, including its books and records, by appropriate tribal officials, who shall have:

(1) The right to verify the daily gross revenues and income from the gaming operation; and

(2) Access to any other gaming-related information the tribe deems appropriate.

(f) *Guaranteed payment to tribe.*

Provide for a minimum guaranteed monthly payment to the tribe in a sum certain that has preference over the retirement of development and construction costs.

(g) *Development and construction costs.* Provide an agreed upon maximum dollar amount for the recoupment of development and construction costs.

(h) *Term limits.* Be for a term not to exceed five (5) years, except that upon the request of a tribe, the Chairman may authorize a contract term that does not exceed seven (7) years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming operation require the additional time. The time period shall begin running no later than the date when the gaming activities authorized by an approved management contract begin.

(i) *Compensation.* Detail the method of compensating and reimbursing the management contractor. If a management contract provides for a percentage fee, such fee shall be either:

(1) Not more than thirty (30) percent of the net revenues of the gaming operation if the Chairman determines that such percentage is reasonable considering the circumstances; or

(2) Not more than forty (40) percent of the net revenues if the Chairman is satisfied that the capital investment required and income projections for the gaming operation require the additional fee.

(j) *Termination provisions.* Provide the grounds and mechanisms for amending or terminating the contract (termination of the contract shall not require the approval of the Chairman).

(k) *Dispute provisions.* Contain a mechanism to resolve disputes between:

(1) The management contractor and customers, consistent with the procedures in a tribal ordinance;

(2) The management contractor and the tribe; and

(3) The management contractor and the gaming operation employees.

(l) *Assignments and subcontracting.* Indicate whether and to what extent contract assignments and subcontracting are permissible.

(m) *Ownership interests.* Indicate whether and to what extent changes in

the ownership interest in the management contract require advance approval by the tribe.

(n) *Effective date.* State that the contract shall not be effective unless and until it is approved by the Chairman, date of signature of the parties notwithstanding.

10. The authority citation for part 533 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

§ 533.3 [Amended]

11. In § 533.1, remove paragraph (c).

12. Revise § 533.2 to read as follows:

§ 533.2 Time for submitting management contracts and amendments.

A tribe or a management contractor shall submit a management contract to the Chairman for review within thirty (30) days of execution by the parties. The Chairman shall notify the parties of their right to appeal the approval or disapproval of the management contract under part 539 of this chapter.

13. Revise § 533.3 to read as follows:

§ 533.3 Submission of management contract for approval.

A tribe shall include in any request for approval of a management contract under this part:

(a) A contract containing:

(1) Original signatures of an authorized official of the tribe and the management contractor;

(2) A representation that the contract as submitted to the Chairman is the entirety of the agreement among the parties; and

(b) A letter, signed by the tribal chairman, setting out the authority of an authorized tribal official to act for the tribe concerning the management contract.

(c) Copies of documents evidencing the authority under paragraph (b) of this section.

(d) A list of all persons and entities identified in §§ 537.1(a) and 537.1(c)(1) of this chapter, and either:

(1) The information required under § 537.1(b)(1) of this chapter for class II gaming contracts and § 537.1(b)(1)(i) of this chapter for class III gaming contracts; or

(2) The dates on which the information was previously submitted.

(e)(1) For new contracts and new operations, a three (3)-year business plan which sets forth the parties' goals, objectives, budgets, financial plans, and related matters; or

(2) For new contracts for existing operations, a three (3) year business plan which sets forth the parties goals, objectives, budgets, financial plans, and

related matters, and income statements and sources and uses of funds statements for the previous three (3) years.

(f) If applicable, a justification, consistent with the provisions of § 531.1(h) of this chapter, for a term limit in excess of five (5) years, but not exceeding seven (7) years.

(g) If applicable, a justification, consistent with the provisions of § 531.1(i) of this chapter, for a fee in excess of thirty (30) percent, but not exceeding forty (40) percent.

(h) A legal description for the site on which the gaming operation to be managed is, or will be, located.

14. Revise § 533.4 to read as follows:

§ 533.4 Action by the Chairman.

(a) The Chairman shall approval or disapprove a management contract, applying the standards contained in § 533.6 of this part, within 180 days of the date on which the Chairman receives a complete submission under § 533.3 of this part, unless the Chairman notifies the tribe and management contractor in writing of the need for an extension of up to ninety (90) days.

(b) A tribe may bring an action in a U.S. district court to compel action by the Chairman:

(1) After 180 days following the date on which the Chairman receives a complete submission if the Chairman does not approve or disapprove the contract under this part; or

(2) After 270 days following the Chairman's receipt of a complete submission if the Chairman has told the tribe and management contractor in writing of the need for an extension and has not approved or disapproved the contract under this part.

§ 533.5 [Removed and Reserved]

15. Remove and reserve § 533.5.

16. Revise § 533.6 to read as follows:

§ 533.6 Approval and disapproval.

(a) The Chairman may approve a management contract if it meets the standards of part 531 of this chapter and § 533.3 of this part. Failure to comply with the standards of part 531 of this chapter or § 533.3 may result in the Chairman's disapproval of the management contract.

(b) The Chairman shall disapprove a management contract for class II gaming if he or she determines that—

(1) Any person with a direct or indirect financial interest in, or having management responsibility for, a management contract;

(i) Is an elected member of the governing body of the tribe that is party to the management contract;

(ii) Has been convicted of any felony or any misdemeanor gaming offense;

(iii) Has knowingly and willfully provided materially false statements or information to the Commission or to a tribe;

(iv) Has refused to respond to questions asked by the Chairman in accordance with his or her responsibilities under this part; or

(v) Is determined by the Chairman to be a person whose prior activities, criminal record, if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of related business and financial arrangements;

(2) The management contractor or its agents have unduly interfered with or influenced for advantage, or have tried to unduly interfere with or influence for advantage, any decision or process of tribal government relating to the gaming operation;

(3) The management contractor or its agents has deliberately or substantially failed to follow the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) A trustee, exercising the skill and diligence to which a trustee is commonly held, would not approve the contract.

(c) The Chairman may disapprove a management contract for class III gaming if he or she determines that a person with a financial interest in, or management responsibility for, a management contract is a person whose prior activities, criminal record, if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of related business and financial arrangements.

17. Revise § 533.7 to read as follows:

§ 533.7 Void agreements.

Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Chairman in accordance with the requirements of part 531 of this chapter and this part, are void.

18. The authority citation for part 535 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

19. Revise § 535.1 to read as follows:

§ 535.1 Amendments.

(a) Subject to the Chairman's approval, a tribe may enter into an amendment of a management contract for the operation of a class II or class III gaming activity.

(b) A tribe shall submit an amendment to the Chairman within thirty (30) days of its execution.

(c) A tribe shall include in any request for approval of an amendment under this part:

(1) An amendment containing original signatures of an authorized official of the tribe and the management contractor and terms that meet the applicable requirements of part 531 of this chapter;

(2) A letter, signed by the tribal chairman, setting out the authority of an authorized tribal official to act for the tribe concerning the amendment;

(3) Copies of documents evidencing the authority under paragraph (c)(2) of this section;

(4) A list of all persons and entities identified in § 537.1(a) and § 537.1(c)(1) of this chapter:

(i) If the amendment involves a change in person(s) having a direct or indirect financial interest in the management contract or having management responsibility for the management contract, a list of such person(s) and either:

(A) The information required under § 537.1(b)(1) of this chapter for class II gaming contracts or § 537.1(b)(1)(i) of this chapter for class III gaming contracts; or

(B) The dates on which the information was previously submitted;

(ii) [Reserved]

(5) If applicable, a justification, consistent with the provisions of § 531.1(h) of this chapter, for a term limit in excess of five (5) years, but not exceeding seven (7) years; and

(6) If applicable, a justification, consistent with the provisions of § 531.1(i) of this chapter, for a management fee in excess of thirty (30) percent, but not exceeding forty (40) percent.

(d)(1) The Chairman shall approve or disapprove an amendment within thirty (30) days from receipt of a complete submission if the amendment does not require a background investigation under part 537 of this chapter, unless the Chairman notifies the parties in writing of the need for an extension of up to thirty (30) days.

(2) The Chairman shall approve or disapprove an amendment as soon as practicable but no later than 180 days from receipt of a complete submission if the amendment requires a background

investigation under part 537 of this chapter;

(3) A party may appeal the Chairman's approval or disapproval of an amendment under part 539 of this chapter. If the Chairman does not approve or disapprove an amendment within the timelines of paragraph (d)(1) or (d)(2) of this section, the amendment shall be deemed disapproved and a party shall have thirty (30) days to appeal the decision under part 539 of this chapter.

(e)(1) The Chairman may approve an amendment to a management contract if the amendment meets the submission requirements of paragraph (c) of this section. Failure to comply with the submission requirements of paragraph (c) of this section may result in the Chairman's disapproval of an amendment.

(2) The Chairman shall disapprove an amendment of a management contract for class II gaming if he or she determines that the conditions contained in § 533.6(b) of this chapter apply.

(3) The Chairman may disapprove an amendment of a management contract for class III gaming if he or she determines that the conditions contained in § 533.6(c) of this chapter apply.

(f) Amendments that have not been approved by the Chairman in accordance with the requirements of this part are void.

20. Revise § 535.3 to read as follows:

§ 535.3 Post-approval noncompliance.

If the Chairman learns of any action or condition that violates the standards contained in parts 531, 533, 535, or 537 of this chapter, the Chairman may require modifications of, or may void, a management contract or amendment approved by the Chairman under such sections, after providing the parties an opportunity for a hearing before the Chairman and a subsequent appeal to the Commission as set forth in part 577 of this chapter. The Chairman will initiate modification or void proceedings by serving the parties, specifying the grounds for the modification or void. The parties will have thirty (30) days to request a hearing or respond with objections. Within thirty (30) days of receiving a request for a hearing, the Chairman will hold a hearing and receive oral presentations and written submissions. The Chairman will make a decision on the basis of the developed record and notify the parties of the decision and of their right to appeal.

21. The authority citation to part 537 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

22. Revise § 537.1 to read as follows:

§ 537.1 Applications for approval.

(a) For each management contract for class II gaming, the Chairman shall conduct or cause to be conducted a background investigation of:

(1) Each person with management responsibility for a management contract;

(2) Each person who is a director of a corporation that is a party to a management contract;

(3) The ten (10) persons who have the greatest direct or indirect financial interest in a management contract;

(4) Any entity with a financial interest in a management contract (in the case of institutional investors, the Chairman may exercise discretion and reduce the scope of the information to be furnished and the background investigation to be conducted); and

(5) Any other person with a direct or indirect financial interest in a management contract otherwise designated by the Commission.

(b) For each natural person identified in paragraph (a) of this section, the management contractor shall provide to the Commission the following information:

(1) Required information. (i) Full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, and gender;

(ii) A current photograph, driver's license number, and a list of all languages spoken or written;

(iii) Business and employment positions held, and business and residence addresses currently and for the previous ten (10) years; the city, state and country of residence from age eighteen (18) to the present;

(iv) The names and current addresses of at least three (3) personal references, including one personal reference who was acquainted with the person at each different residence location for the past five (5) years;

(v) Current business and residence telephone numbers;

(vi) A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses;

(vii) A description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses;

(viii) The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit relating to gaming, whether or not such license or permit was granted;

(ix) For each gaming offense and for each felony for which there is an ongoing prosecution or a conviction, the name and address of the court involved, the charge, and the dates of the charge and of the disposition;

(x) For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within ten (10) years of the date of the application, the name and address of the court involved, and the dates of the prosecution and the disposition;

(xi) A complete financial statement showing all sources of income for the previous three (3) years, and assets, liabilities, and net worth as of the date of the submission; and

(xii) For each criminal charge (excluding minor traffic charges) regardless of whether or not it resulted in a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraphs (b)(1)(ix) or (b)(1)(x) of this section, the name and address of the court involved, the criminal charge, and the dates of the charge and the disposition.

(2) Fingerprints. The management contractor shall arrange with an appropriate federal, state, or tribal law enforcement authority to supply the Commission with a completed form FD-258, Applicant Fingerprint Card, (provided by the Commission), for each person for whom background information is provided under this section.

(3) Responses to Questions. Each person with a direct or indirect financial interest in a management contract or management responsibility for a management contract shall respond within thirty (30) days to written or oral questions propounded by the Chairman.

(4) Privacy notice. In compliance with the Privacy Act of 1974, each person required to submit information under this section shall sign and submit the following statement:

Solicitation of the information in this section is authorized by 25 U.S.C. 2701 *et seq.* The purpose of the requested information is to determine the suitability of individuals with a financial interest in, or having management responsibility for, a management contract. The information will be used by the National Indian Gaming Commission members and staff and Indian tribal officials who have need for the information in the performance of their official duties. The information may be disclosed to appropriate federal, tribal, state, or foreign law enforcement and regulatory agencies in connection with a background investigation or when relevant to civil, criminal or regulatory investigations or prosecutions or investigations of activities while associated with a gaming operation.

Failure to consent to the disclosures indicated in this statement will mean that the Chairman of the National Indian Gaming Commission will be unable to approve the contract in which the person has a financial interest or management responsibility.

The disclosure of a persons' Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing the information provided.

(5) Notice regarding false statements. Each person required to submit information under this section shall sign and submit the following statement:

A false statement knowingly and willfully provided in any of the information pursuant to this section may be grounds for not approving the contract in which I have a financial interest or management responsibility, or for disapproving or voiding such contract after it is approved by the Chairman of the National Indian Gaming Commission. Also, I may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).

(c) For each entity identified in paragraph (a)(4) of this section, the management contractor shall provide to the Commission the following information:

(1) List of individuals. (i) Each of the ten (10) largest beneficiaries and the trustees when the entity is a trust;

(ii) Each of the ten (10) largest partners when the entity is a partnership;

(iii) Each person who is a director or who is one of the ten (10) largest holders of the issued and outstanding stock alone or in combination with another stockholder who is a spouse, parent, child or sibling when the entity is a corporation; and

(iv) For any other type of entity, the ten (10) largest owners of that entity alone or in combination with any other owner who is a spouse, parent, child or sibling and any person with management responsibility for that entity.

(2) Required information. (i) The information required in paragraph (b)(1)(i) of this section for each individual identified in paragraph (c)(1) of this section;

(ii) Copies of documents establishing the existence of the entity, such as the partnership agreement, the trust agreement, or the articles of incorporation;

(iii) Copies of documents designating the person who is charged with acting on behalf of the entity;

(iv) Copies of bylaws or other documents that provide the day-to-day operating rules for the organization;

(v) A description of any existing and previous business relationships with

Indian tribes, including ownership interests in those businesses;

(vi) A description of any existing and previous business relationships with the gaming industry generally, including ownership interest in those businesses;

(vii) The name and address of any licensing or regulatory agency with which the entity has filed an application for a license or permit relating to gaming, whether or not such license or permit was granted;

(viii) For each gaming offense and for each felony for which there is an ongoing prosecution or a conviction, the name and address of the court involved, the charge, and the dates of the charge and disposition;

(ix) For each misdemeanor conviction or ongoing misdemeanor prosecution within ten (10) years of the date of the application, the name and address of the court involved, and the dates of the prosecution and disposition;

(x) Complete financial statements for the previous three (3) fiscal years; and

(xi) For each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (c)(1)(viii) or (c)(1)(ix) of this section, the criminal charge, the name and address of the court involved and the dates of the charge and disposition.

(3) Responses to questions. Each entity with a direct or indirect financial interest in a management contract shall respond within thirty (30) days to written or oral questions propounded by the Chairman.

(4) Notice regarding false statements. Each entity required to submit information under this section shall sign and submit the following statement:

A false statement knowingly and willfully provided in any of the information pursuant to this section may be grounds for not approving the contract in which we have a financial interest, or for disapproving or voiding such contract after it is approved by the Chairman of the National Indian Gaming Commission. Also, we may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).

23. Revise § 537.3 to read as follows:

§ 537.3 Fees for background investigations.

(a) A management contractor shall pay to the Commission or the contractor(s) designated by the Commission the cost of all background investigations conducted under this part.

(b) The management contractor shall post a bond, letter of credit, or deposit with the Commission to cover the cost

of the background investigations as follows:

(1) Management contractor (party to the contract)—\$25,000.

(2) Each individual and entity with a financial interest in the contract—\$10,000.

(c) The management contractor shall be billed for the costs of the investigation as it proceeds; the investigation shall be suspended if the unpaid costs exceed the amount of the bond, letter of credit, or deposit available.

(1) An investigation will be terminated if any bills remain unpaid for more than thirty (30) days.

(2) A terminated investigation will preclude the Chairman from making the necessary determinations and result in a disapproval of a management contract.

(d) The bond, letter of credit or deposit will be returned to the management contractor when all bills have been paid and the investigations have been completed or terminated.

24. The authority citation for part 539 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

25. Revise § 539.1 to read as follows:

§ 539.1 Scope of this part.

This part applies to appeals from the Chairman's decision to approve or disapprove a management contract or amendment under this subchapter, except that appeals from the Chairman's decision to require modifications of or to void a management contract or amendment subsequent to his or her initial approval are addressed in § 535.3 and part 577 of this chapter.

26. Revise § 539.2 to read as follows:

§ 539.2 Appeals.

A party may appeal the Chairman's approval or disapproval of a management contract or amendment under parts 533 or 535 of this chapter to the Commission. Such an appeal shall be filed with the Commission within thirty (30) days after the Chairman serves his or her determination pursuant to part 519 of this chapter. Failure to file an appeal within the time provided by this section shall result in a waiver of the opportunity for an appeal. At the time of filing, an appeal under this section shall specify the reasons why the party believes the Chairman's determination to be erroneous, and shall include supporting documentation, if any. Within thirty (30) days after receipt of the appeal, the Commission shall render a decision unless the appellant elects to provide the Commission additional time, not to exceed an additional thirty

(30) days, to render a decision. In the absence of a decision within the time provided, the Chairman's decision shall constitute a final decision of the Commission.

27. The authority citation for part 556 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2712.

28. Revise § 556.2 to read as follows:

§ 556.2 Privacy notice.

(a) A tribe shall place the following notice on the application form for a key employee or a primary management official before that form is filled out by an applicant:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. 2701 *et seq.* The purpose of the requested information is to determine the eligibility of individuals to be granted a gaming license. The information will be used by the Tribal gaming regulatory authorities and by the National Indian Gaming Commission members and staff who have need for the information in the performance of their official duties. The information may be disclosed to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies when relevant to civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a tribe or the National Indian Gaming Commission in connection with the issuance, denial, or revocation of a gaming license, or investigations of activities while associated with a tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a tribe's being unable to license you for a primary management official or key employee position.

The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application.

(b) A tribe shall notify in writing existing key employees and primary management officials that they shall either:

(1) Complete a new application form that contains a Privacy Act notice; or

(2) Sign a statement that contains the Privacy Act notice and consent to the routine uses described in that notice.

(c) All tribal gaming ordinances and ordinance amendments approved by the Chairman prior to the effective date of this section will require no changes to comply with this section. Future submissions, however, must comply.

(d) All license application forms used 180 days after the effective date of this section shall contain notices in compliance with this section.

29. Revise § 556.3 to read as follows:

§ 556.3 Notice regarding false statements.

(a) A tribe shall place the following notice on the application form for a key

employee or a primary management official before that form is filled out by an applicant:

A false statement on any part of your license application may be grounds for denying a license or the suspension or revocation of a license. Also, you may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).

(b) A tribe shall notify in writing existing key employees and primary management officials that they shall either:

(1) Complete a new application form that contains a notice regarding false statements; or

(2) Sign a statement that contains the notice regarding false statements.

(c) All tribal gaming ordinances and ordinance amendments approved by the Chairman prior to the effective date of this section will require no changes to comply with this section. Future submissions, however, must comply.

(d) All license application forms used 180 days after the effective date of this section shall contain notices in compliance with this section.

30. The authority citation for part 558 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2712.

31. Revise § 558.2 to read as follows:

§ 558.2 Eligibility determination for granting a gaming license.

(a) An authorized tribal official shall review a person's prior activities, criminal record, if any, and reputation, habits and associations to make a finding concerning the eligibility of a key employee or a primary management official for granting of a gaming license. If the authorized tribal official, in applying the standards adopted in a tribal ordinance, determines that licensing of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming, a management contractor or a tribal gaming operation shall not license that person in a key employee or primary management official position.

(b) All tribal gaming ordinances and ordinance amendments approved by the Chairman prior to the effective date of this section will require no changes to comply with this section. Future submissions, however, must comply.

32. The authority citation for part 571 continues to read as follows:

Authority: 25 U.S.C. 2706(b), 2710(b)(2)(C), 2715, 2716.

33. Revise § 571.12 to read as follows:

§ 571.12 Audit standards.

(a) Each tribe shall prepare comparative financial statements covering all financial activities of each class II and class III gaming operation on the tribe's Indian lands for each fiscal year.

(b) A tribe shall engage an independent certified public accountant to provide an annual audit of the financial statements of each class II and class III gaming operation on the tribe's Indian lands for each fiscal year. The independent certified public accountant must be licensed by a state board of accountancy. Financial statements prepared by the certified public accountant shall conform to generally accepted accounting principles and the annual audit shall conform to generally accepted auditing standards.

(c) If a gaming operation has assessable gross revenues of less than \$1,000,000 during the prior fiscal year, the annual audit requirement of paragraph (b) is satisfied if:

(1) The independent certified public accountant completes a review of the financial statements conforming to the statements on standards for accounting and review services of the gaming operation;

(2) Unless waived in writing by the Commission, the gaming operation's financial statements for the three previous years were timely received by the Commission in accordance with § 571.13; and

(3) The tribe must submit a statement to the Commission supporting the decision to use reviewed financial statements in place of audited financial statements. The statement is a one-time submission unless the tribe chooses another permissible filing alternative.

(d) If a gaming operation has multiple gaming places, facilities or locations on the tribe's Indian lands, the annual audit requirement of paragraph (b) is satisfied if:

(1) The tribe chooses to consolidate the financial statements of the gaming places, facilities or locations;

(2) The independent certified public accountant completes an audit conforming to generally accepted auditing standards of the consolidated financial statements;

(3) The consolidated financial statements include consolidating schedules for each gaming place, facility, or location;

(4) Unless waived in writing by the Commission, the gaming operation's financial statements for the three previous years, whether or not consolidated, were timely received by the Commission in accordance with § 571.13;

(5) The tribe must submit a statement supporting the decision for consolidated financial statements in place of audited financial statements for each location. The statement is a one-time submission unless the tribe chooses another permissible filing alternative; and

(6) The independent certified public accountant expresses an opinion on the consolidated financial statement as a whole and subjects the accompanying financial information to the auditing procedures applicable to the audit of consolidated financial statements.

(e) If there are multiple gaming operations on a tribe's Indian lands and each operation has assessable gross revenues of less than \$1,000,000 during the prior fiscal year, the annual audit requirement of paragraph (b) of this section is satisfied if:

(1) The tribe chooses to consolidate the financial statements of the gaming operations;

(2) The consolidated financial statements include consolidating schedules for each operation;

(3) The independent certified public accountant completes a review of the consolidated schedules conforming to the statements on standards for accounting and review services for each gaming facility or location;

(4) Unless waived in writing by the Commission, the gaming operations' financial statements for the three previous years, whether or not consolidated, were timely received by the Commission in accordance with § 571.13;

(5) The tribe must submit a statement to the Commission supporting both the decision to use reviewed financial statements in place of audited financial statements and the decision to use consolidated financial statements in place of audited financial statements for each operation. The statement is a one-time submission unless the tribe chooses another permissible filing alternative; and

(6) The independent certified public accountant expresses an opinion on the consolidated financial statements as a whole and subjects the accompanying financial information to the auditing procedures applicable to the audit of consolidated financial statements.

34. Revise § 571.13 to read as follows:

§ 571.13 Copies of audit reports.

(a) Each tribe shall prepare and submit to the Commission two paper copies or one electronic copy of the financial statements and audits required by § 571.12, together with management letter(s), setting forth the results of each fiscal year. The submission must be received by the Commission within 120

days after the end of each fiscal year of the gaming operation.

(b) If a gaming operation changes its fiscal year, the tribe shall prepare and submit to the Commission two paper copies or one electronic copy of the financial statements and audits required by § 571.12, together with management letter(s), setting forth the results of the stub period from the end of the previous fiscal year to the beginning of the new fiscal year. The submission must be received by the Commission within 120 days after the end of the stub period, or a tribe may incorporate the financial results of the stub period in the financial statements for the new business year.

(c) When gaming ceases to operate and the tribal gaming regulatory authority has terminated the facility license required by § 559.6, the tribe shall prepare and submit to the Commission two paper copies or one electronic copy of the financial statements and audits required by § 571.12, together with management letter(s), setting forth the results covering the period since the period covered by the previous financial statements. The submission must be received by the Commission within 120 days after the cessation of gaming activity or upon completion of the tribe's fiscal year.

35. Revise § 571.14 to read as follows:

§ 571.14 Relationship of financial statements to fee assessment reports.

A tribe shall reconcile its Commission fee assessment reports, submitted under 25 CFR part 514, with its audited or reviewed financial statements for each location and make available such reconciliation upon request by the Commission's authorized representative.

36. The authority citation for part 573 continues to read as follows:

Authority: 25 U.S.C. 2705(a)(1), 2706, 2713, 2715.

37. Add new paragraph (a)(13) to § 573.6 to read as follows:

§ 573.6 Order of temporary closure.

* * * * *

(13) A gaming facility operates on Indian lands not eligible for gaming under 25 U.S.C. 2703(4); 2710(a), (b)(1), and (d)(1); and 2719.

* * * * *

Philip N. Hogen,
Chairman.

Norman H. DesRosiers,
Vice Chairman.

[FR Doc. E8-30019 Filed 12-19-08; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-113462-08]

RIN 1545-BH77

Conduit Financing Arrangements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to conduit financing arrangements issued under the authority granted by section 7701(l) of the Internal Revenue Code (Code). The proposed regulations apply to multiple-party financing arrangements that are effected through disregarded entities, and are necessary in order to determine which of those arrangements should be recharacterized under section 7701(l) and Treas. Reg. § 1.881-3.

DATES: Written or electronic comments and requests for a public hearing must be received by March 23, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-113462-08), Internal Revenue Service, room 5205, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-113462-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-113462-08).

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Quyen Huynh at (202) 622-3880 or John H. Seibert at (202) 622-3860; concerning submissions of comments, Oluwafunmilayo Taylor, at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 7701(l) of the Code authorizes the Secretary to prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any two or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent the avoidance of any tax imposed by the Code. In Treasury decision 8611 (1995-37 IRB 20; 60 FR 40997), published August 10, 1995, the Treasury Department and the Internal Revenue Service (IRS) issued implementing regulations under Treas.

Reg. § 1.881-3 relating to conduit financing arrangements pursuant to the authority granted by section 7701(l).

In general, § 1.881-3 allows the IRS to disregard the participation of one or more intermediate entities in a financing arrangement where such entities are acting as conduit entities, and to recharacterize the financing arrangement as a transaction directly between the remaining parties to the financing arrangement for purposes of imposing tax under sections 871, 881, 1441 and 1442 of the Code. Section 1.881-3(a)(2)(i)(A) of the regulations defines a financing arrangement to mean a series of financing transactions by which one person (the financing entity) advances money or other property, or grants rights to use property, and another person (the financed entity) receives money or other property, or rights to use property, if the advance and receipt are effected through one or more other persons (intermediate entities). Except in cases to which § 1.881-3(a)(2)(i)(B) (special rule for related parties) applies, the regulations apply only if financing transactions as defined in § 1.881-3(a)(2)(ii) link the financing entity, each of the intermediate entities, and the financed entity.

Since the publication of § 1.881-3 on August 10, 1995, the Treasury Department and IRS issued the so-called "check-the-box" regulations, under §§ 301.7701-1 through 301.7701-3, effective January 1, 1997 (TD 8697, 1997-1 CB 215; 61 FR 66854). Section 301.7701-3 provides, in part, that an entity that is not classified as a corporation and that has a single owner may elect to be disregarded as an entity separate from its owner (a disregarded entity).

The Treasury Department and IRS are aware that issues have arisen regarding the proper treatment of disregarded entities under § 1.881-3. These proposed regulations clarify that a disregarded entity is a person for purposes of § 1.881-3. Thus, transactions that a disregarded entity enters into will be taken into account for purposes of determining whether a financing arrangement exists.

The Treasury Department and IRS are continuing to study conduit financing arrangements and may issue separate guidance to address the treatment under § 1.881-3 of certain hybrid instruments. Specifically, the Treasury Department and IRS are studying transactions where a financing entity advances cash or other property to an intermediate entity in exchange for a hybrid instrument that is treated as debt under the laws of the foreign jurisdiction where the