revising § 5.20(h) to authorize the Deputy Commissioner for Management and Systems and the Director, Office of Financial Management to perform the functions of the Commissioner of Food and Drugs under section 736(d)(c) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379h(d)(C)), as amended hereafter, to waive or reduce prescription drug user fees in situations where it is determined that ''the fees will exceed the anticipated present and future costs.'' Further, this authority is revoked from the delegations to the Chief Mediator and Ombudsman/ Deputy User Fee Waiver Officer, the Deputy Chief Mediator and Ombudsman, and the Deputy User Fee Waiver Officer, who previously had the authority.

Further redelegation of this authority is not authorized at this time. Authority delegated to a position by title may be exercised by a person officially designated to serve in such position in an acting capacity or on a temporary basis.

List of Subjects in 21 CFR Part 5

Authority delegations (Government agencies), Imports, Organization and functions (Government agencies).

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 5 is amended as follows:

PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION

1. The authority citation for 21 CFR part 5 continues to read as follows:

Authority: 5 U.S.C. 504, 552, App. 2; 7 U.S.C. 138a, 2271; 15 U.S.C. 638, 1261-1282, 3701-3711a; 15 U.S.C. 1451-1461; 21 U.S.C. 41-50, 61-63, 141-149, 321-394, 467f, 679(b), 801-886, 1031-1309; 35 U.S.C. 156; 42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 264, 265, 300u-300u-5, 300aa-1; 1395y, 3246b, 4332, 4831(a), 10007-10008; E.O. 11921, 41 FR 24294, 3 CFR, 1977 Comp., p. 124-131; E.O. 12591, 52 FR 13414, 3 CFR, 1988 Comp., p. 220-223.

2. Section 5.20 is amended by revising paragraph (h) to read as follows:

§ 5.20 General redelegations of authority from the Commissioner to other officers of the Food and Drug Administration.

* * * * *

(h)(1) The Chief Mediator and Ombudsman, designated as the User Fee Waiver Officer; the Deputy Chief Mediator and Ombudsman; and the Deputy User Fee Waiver Officer are authorized to perform the functions of the Commissioner under the Prescription Drug User Fee Act of 1992, as amended by the FDA Modernization Act of 1997 (21 U.S.C. 379h(d)), as amended hereafter, relating to waiving or reducing prescription drug user fees except for the functions under 21 U.S.C. 379h(d)(C), which pertains to situations where ''the fees will exceed the anticipated present and future costs.'' These authorities may not be further redelegated.

(2) The Deputy Commissioner for Management and Systems and the Director, Office of Financial Management are authorized to perform the functions of the Commissioner under 21 U.S.C. 379h(d)(C), as amended hereafter, to waive or reduce prescription drug user fees in situations where it is determined that ''the fees will exceed the anticipated present and future costs.'' This authority may not be further redelegated.

(3) The Deputy Commissioner for Operations, designated as the User Fee Appeals Officer, is authorized to hear and decide user fee waiver appeals. The decision of the User Fee Appeals Officer will constitute final agency action on such matters.

* * * * *

Dated: July 29, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 98–20954 Filed 8–5–98; 8:45 am]

BILLING CODE 4160–01–F

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 518

RIN 3141–AA04

Issuance of Certificates of Self Regulation to Tribes for Class II Gaming

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission issues this rule which provides a process for the review and approval of petitions for tribal self-regulation of Class II gaming. This rule implements the Class II self-regulatory provisions of the Indian Gaming Regulatory Act and will provide both a financial benefit and reduction in Federal regulations for tribes that obtain certificates under this rule.

EFFECTIVE DATE: September 8, 1998.

FOR FURTHER INFORMATION CONTACT: Maria Getoff, National Indian Gaming Commission, 1441 L Street, NW, Suite 9100, Washington, DC 20036; telephone: 202–632–7003.

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act (IGRA, or the Act), enacted on October 17, 1988, established the National Indian Gaming Commission (Commission). Under the Act, the Commission is charged with regulating class II gaming and certain aspects of class III gaming on Indian lands. On March 12, 1998, the Commission proposed regulations for the issuance of certificates of self-regulation for class II gaming to Tribes. 63 FR 12319–12323. The Commission requested comments on those proposed regulations. On April 1, 1998, the Commission held a public hearing in Portland, Oregon, on the proposed regulations. Below is the Commission's analysis of the comments received both in writing during the comment period, and at the public hearing. In addition, prior to the drafting of the proposed rules, all gaming tribes were asked to provide comments on the meaning of the term, ''self-regulating'', which the Commission has also considered. Below is the Commission's analysis of the comments received during the comment period and the text of the final regulations.

General Comments

One commenter advocated for negotiated rule making in the promulgation of these regulations. The Commission concluded that negotiated rule making would not allow the Commission to issue these regulations in a timely manner. However, the regulated community was provided several opportunities to comment on both the concept of self-regulation generally and the proposed regulations specifically. On November 13, 1997, the Commission sent a ''Notice to Interested Parties'' to all gaming tribes requesting comments on the meaning of the term, ''self-regulation.'' In addition, on November 18, 1997, NIGC Chairman Tadd Johnson addressed a gathering of tribes in Santa Fe, New Mexico, where he discussed self regulation. Further, on January 27, 1998, members of the Commission staff met with tribal representatives in Washington, D.C. to discuss the concept of self-regulation. In early February 1998, Commission staff held an open meeting at the Gila River reservation in Arizona for the purpose of discussing self-regulation and other regulations. Then, on April 1, 1998, the Commission held a public hearing on self-regulation in Portland, Oregon. Seven witnesses testified, representing tribes with both large and small gaming operations.

Another commenter stated that ''IGRA prohibits the NIGC from regulating Class II gaming by Tribes with certificates,

and regulations that provide for continued NIGC regulation of Class II gaming by certified tribes violate IGRA.'' This and other commenters believe that, at a minimum, the regulations should spell out the powers of the Commission that are not enforceable against certified tribes.

The IGRA does not provide for a blanket prohibition on the regulatory power of the Commission with respect to a self regulated tribe. The Commission will continue to maintain oversight, investigative, and enforcement responsibilities with respect to tribes that hold certificates of self-regulation. The IGRA does limit the powers of the Commission with respect to self-regulating tribes, but does so in very specific terms. It states that ''During any year in which a tribe has a certificate for self-regulation, the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of IGRA.'' 25 U.S.C. 2710(c)(5)(A). Those sections direct the Commission to monitor class II gaming on a continuing basis; inspect and examine class II gaming premises; conduct or cause to be conducted background investigations; and permit the Commission to demand access to and inspect, examine, photocopy and audit all papers, books, and records regarding revenues of class II gaming. Therefore, while the IGRA exempts certain self regulated tribes from these provisions, other requirements of IGRA and NIGC regulations still apply. The Commission has added the following language to § 518.9 , which provides that the Commission retains investigative and enforcement authority over self regulated tribes: ''Subject to the provisions of 25 U.S.C. 2710(c)(5)(A).''

One commenter suggested that regulations are not required to implement IGRA's certificate of self-regulation provision. This commenter expressed the opinion that the statute is sufficient, wherein Congress set forth the requirements for certificates, and gave the Commission the power to hear and adjudicate petitions.

The Commission disagrees. Section 2706(b)(10) of IGRA grants the Commission the power to ''promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the IGRA.'' While the statutory language in IGRA provides some guidance on Congress's intent with respect to self-regulation, the Commission must promulgate these rules in order to establish a system by which the Commission may evaluate whether a tribe has met the statutory criteria for the issuance of a certificate of self-regulation.

Several commenters suggested that the Commission should ensure that tribes with certificates pay less fees than tribes without certificates, and that the regulations should reflect this. These commenters believe that because the fee rate for all class II gaming tribes is currently set at .08%, well below the .25% maximum allowed for a self-regulated tribe, there is no incentive to become self-regulated.

The Commission agrees, as a general matter, that tribes with certificates should pay a lower fee than tribes without certificates. The IGRA provides that the Commission may not assess a fee on the class II gaming activity of a tribe with a certificate in excess of 0.25 percent. 25 U.S.C. 2710(c)(5)(C). Therefore, the Commission plans to establish fee rates for self-regulated tribes through the annual fee notice which will recognize and reward self regulated status.

Another commenter suggested that the following language in the preamble to the proposed regulations is too restrictive: ''The regulatory entity should have no involvement in the operational or managerial decisions of a gaming facility, except to the extent that the regulatory body identifies violations of federal or tribal law.'' 63 FR 12319, March 12, 1998.

Although this language may be broader than intended, the Commission wanted to clarify that the tribal regulatory body should not operate or manage the gaming facility. The tribal regulatory body should be an arm of the tribal government, established for the exclusive purpose of regulating and monitoring gaming on behalf of the tribe. Effective regulatory oversight requires that there be a separation between the regulation and operation of the tribal gaming activities. The tribal regulatory body may monitor all operating and management functions, consistent with its regulatory responsibilities.

Section 518.1 What Does This Part Cover?

A commenter suggested that a certificate should be issued to each separate operation, not to the tribe as a whole. The rationale behind this suggestion is that one tribe may have several operations which could cause the delay of certification for all operations due to problems with just one.

The Commission disagrees. A certificate of self-regulation issues to the tribe, in recognition of their ability to regulate effectively. If a tribe cannot effectively regulate some portion of its gaming operation, it has not demonstrated that it is able to effectively regulate all gaming operations.

Section 518.2 Who May Petition for a Certificate of Self-Regulation?

Two commenters suggested that § 518.2(a) would restrict self-regulation status to only those specific class II games actually played by the tribe for three years prior to its petition, and would effectively place a ban on new games.

The Commission does not intend this language to limit the introduction of new games. The language in § 518.2(a) mirrors the language in IGRA, which provides, in relevant part, that ''Any Indian tribe which operates a class II gaming activity and which has continuously conducted such activity for a period of not less than three years * * *'' may petition for a certificate of self-regulation. 25 U.S.C. 2710(c)(3)(A). Therefore, the petitioning tribe must have operated some type of class II gaming activity for the three year period immediately preceding the date of the petition. To interpret the statute to mean that a self-regulating tribe could not introduce new games that were not offered during that three year period would, as noted by the commenter, be so impractical as to render certificates of self-regulation useless. The Commission does not believe that Congress intended such a result. The Commission does not believe that this section requires any change.

One commenter stated that the word ''continuously'' in § 518.2(a) needs clarification. This paragraph requires that, in order to petition for a certificate, the tribe has continuously conducted the gaming activity for which it seeks self-regulation. The commenter stated that some tribes may temporarily shut down their gaming operations due to construction or to the seasonal nature of their business.

The term ''continuously'' is taken directly from IGRA at 25 U.S.C. 2710(c)(3)(A). The Commission will implement the common sense definition of the term ''continuous''. Webster's Ninth New Collegiate Dictionary defines continuous as ''marked by uninterrupted extension in space, time, or sequence''. The Commission does not believe that Congress intended to mean that if a gaming operation closed for one day or one week, that the tribe would be precluded from obtaining a certificate of self regulation. A tribe would, however, be precluded if the operation had closed for one year. The Commission intends to look at each situation on a case-by-case basis.

Several commenters stated that § 518.2(b) and § 518.2(d), which require all gaming engaged in by the tribe to be legal under IGRA, unnecessarily place a tribe's class III gaming operation under scrutiny.

The Commission disagrees. The language of § 518.2(d) is taken verbatim from IGRA, which requires, in relevant part, that a tribe may petition the Commission for a certificate of self-regulation if it ''has otherwise complied with the provision of this section.'' 25 U.S.C. 2710(c)(3)(B). The statutory language is clear. If Congress had intended for a tribe to be able to petition for a class II self-regulation certificate regardless of whether it had complied with the law with respect to its class III gaming, it would have said so.

Section 518.3 What Must a Tribe Submit to the Commission as Part of its Petition?

One commenter suggested that the petition should be approved by the tribal regulatory body, not the governing body of the tribe as required by § 518.3(a)(1), because the regulatory functions of the tribal regulatory body must be independent from the influences of the tribal government.

The Commission agrees that the tribal regulatory body must be independent from the tribal government. However, the tribal regulatory body is an arm of the tribal government. The final authority and responsibility over gaming and its tribal regulation is vested with the tribe. The authority to establish a regulatory structure or tribal regulatory body comes from the sovereign powers of tribal governments. Furthermore, a tribe's qualification for certification is dependent in part upon whether it follows procedures which are beyond the scope of the tribal regulatory body. Therefore, the Commission does not believe, as suggested by the commenter, that the decision to submit a petition for a certificate of self-regulation is a decision that should be made by the tribal regulatory body. The decision to petition for self-regulation status is a decision to be made by the tribe. The tribe may, however, delegate such authority to the tribal regulatory body.

One commenter stated that it was unclear whether § 518.3(a)(1)(iii), which requires a description of the process by which positions on the tribal regulatory body are filled, applies to positions for Gaming Commissioners and Attorneys. Another commenter recommended that this paragraph be expanded to require job descriptions and qualifications, as well as any disqualifying criteria.

This paragraph requires a description of the manner in which all positions on the tribal regulatory body are filled, including staff and higher level regulators. Therefore, this provision applies both to those who actually sit on the regulatory body, such as the Chairman, Gaming Commissioners or the Executive Director, and to all staff level employees, including investigators, auditors, attorneys, etc. In order to clarify this requirement, the Commission has revised § 518.3(a)(1)(iii) to read as follows: ''a description of the process by which all employee and regulator positions at the independent tribal regulatory body are filled, including qualifying and disqualifying criteria.'' During its investigation, the Commission may request job descriptions, but that information is not required to be provided with the petition.

The Commission has added the following language to § 518.3(a)(1)(v): ''and, if serving limited terms, the expiration date of such terms.''

One commenter questioned why the Commission requires a list of current gaming operation division heads to be submitted with the petition under § 518.3(a)(1)(vi). This information will identify for the Commission who is in charge of each division so that the Commission will know who to contact for information during the course of the investigation. In addition, the Commission may check this against the information the Commission has previously received from the tribe.

One commenter noted that several paragraphs of § 518.3 require the tribe to include in its petition, or make available to the Commission, information dating back three years from the date of the petition. This commenter suggested that the IGRA only requires that certificates be based on ''available information'', not new special information designed solely for certificates of self-regulation. This commenter raised specific concerns with respect to § 518.3(a)(2)(v). Another commenter stated that to require tribes to have reports on internal controls is overburdensome and not required by IGRA. Both commenters noted that the three year requirement is retroactive and therefore places an undue burden on tribes because they will be denied self regulation status if they are unable to produce the reports. Another commenter stated that § 518.3(a)(2)(v) should be clarified to indicate what constitutes a ''report on internal controls based on audits of the financial statements.'' This commenter questioned whether this refers to compliance reviews by the tribal regulatory body, or to responses by the operator to the annual financial audits.

The Commission believes that generally, the information required by § 518.3 is not ''new special information designed solely for certificates'', but is information that should already be maintained in the ordinary course of business by a ''self-regulating'' class II gaming tribe. For instance, if a tribe does not ordinarily maintain information on allegations of criminal activity and information on investigation and enforcement of tribal gaming ordinance violations, the Commission believes that such tribe is not maintaining the type of system of records that would allow the Commission to make a determination that such tribe is self-regulating. The Commission agrees that tribes may not receive or produce reports on internal controls in the ordinary course of business, and that it would be unfair to make the existence of such reports a prerequisite to self regulation. However, the Commission believes that if such reports do exist, they would provide an indication that the tribe meets the criteria for self regulation. Therefore, the Commission has removed this as a requirement under § 518.3, and has added a new section (9) to § 518.4(b). This new section provides that the Commission will consider whether reports are received or produced by the tribe, the tribal regulatory body, or the gaming operation based on an evaluation of the internal controls of the gaming operation during the three (3) year period immediately preceding the date of the petition. If such reports exist, the Commission will review those reports in the course of its investigation. This new language should help to clarify what constitutes a ''report on internal controls''.

Several commenters questioned whether the language in § 518.3(a)(2) requires the tribe to list the documents in the petition that would then be available to the Commission to inspect or whether those documents were to be submitted to the Commission.

The Commission intends only for the petition to include a descriptive list of the documents or record keeping systems described in §§ 518.3(a)(2)(i)–518.3(a)(4) and an assurance that the listed documents and records are available for the Commission's review. (The documents mentioned in §§ 518.3(a)(1)(i)–(vii), however, must be included with the petition.) Therefore, the Commission revises this section to add ''descriptive'' before ''list'' and to replace, ''to which the Commission shall have access'' with ''together with an assurance that the listed documents

or records are available for the Commission's review.''

One commenter was concerned about § 518.3(a)(2)(ii), and indicated that tribal regulatory bodies are not ordinarily involved in any way with a tribe's revenue allocation plan, and it is not apparent how a tribe's revenue allocation plan bears on the Commission's evaluation of a tribal regulatory body's qualification for certification.

It is the tribe, not the tribal regulatory body, that is the petitioner and the intended recipient of a certificate. For the Commission to determine adequately whether the gaming activity has been conducted in full compliance with IGRA, as required by § 518.4(a)(4), the Commission must be able to evaluate whether gaming revenues are allocated in accordance with the law.

One commenter questioned whether § 518.3(a)(2)(iii) requires a description of the accounting system from the operation, the tribal government, or both if two separate accounting systems exist.

This provision refers to the accounting systems of both the gaming operation and the tribe. The latter is necessary to understand how the tribe uses and accounts for the revenues received from the gaming operation in accordance with the purposes allowed under IGRA. Because the proposed rule may be confusing, the Commission revises the language to read, ''A description of the accounting system(s) at both the gaming operation and the tribe that account for the flow of gaming revenues from receipt to their ultimate use, consistent with IGRA.''

One commenter stated that a definition of ''records'' is needed. This commenter questioned whether, under § 518.3(a)(2)(vii), a summary of the investigation/enforcement action would be sufficient. This and other commenters indicated that some allegations are made outside tribal jurisdiction, and that it would be burdensome to require the tribal regulatory body to assemble documents from third parties. A commenter also questioned the meaning of ''records'' under § 518.3(a)(2)(vii).

The Commission recognizes that several paragraphs of § 518.3(a)(2) are confusing in terms of what information should be provided to the Commission. First of all, the tribe is not required to submit the actual documents, nor does the Commission intend by this rule to require a tribe to gather records from other jurisdictions or parties. The rule states that the documents that are to be made available to the Commission are documents that are maintained by the tribe. With respect to the ''records'' language, the Commission made the following changes: to § 518.3(a)(2)(vi), delete ''records of'' and add, ''a description of the record keeping system for'' before the word ''all''; to § 518.3(a)(2)(vii), delete ''records of'' and add, ''a description of the record keeping system for'' before the word ''all''; and to § 518.3(a)(2)(viii) delete ''records'' and add, ''a description of the personnel record keeping system'' before the word ''of''. Section 518.3(a)(2)(vii) includes all records maintained by the tribe, not just by the tribal regulatory body. This would include records maintained by the tribal prosecutor and tribal court.

To further clarify that the information required under § 518.3(a)(2) is to be provided by way of a list instead of the actual documents, the Commission has removed, ''including the name, title, and licensing status of each employee'' from § 518.3(a)(2)(viii). The tribe is required, under this paragraph, to provide a description of its personnel record keeping system, and is not required to specifically provide the names, titles, and licensing status of each employee. This is information that the Commission will gather when it visits the tribe to conduct its investigation, or will request at a later date.

Additional clarification was made to § 518.3(a)(2)(vi) and § 518.3(a)(2)(vii). In § 518.3(a)(2)(vi), the language ''for the three (3)-year period immediately preceding the date of the petition'' was removed from the beginning of the paragraph and inserted after the word, ''activity''. In § 518.3(a)(2)(vii), the language ''for the three (3)-year period immediately preceding the date of the petition'' was removed from the beginning of the paragraph and inserted after the word ''regulations.'' These changes were made to clarify that the three year period refers to the records that the Commission will have access to, and not to the description of the record keeping system.

With respect to § 518.3(a)(2)(viii) one commenter noted that while the IGRA requires a tribe to license certain key employees there is no requirement that it maintain records of all employees as required by § 518.3(a)(2)(viii). This commenter believes that to require a tribal regulatory body to gather this information if it does not have it distorts the Commission's evaluation, in that the Commission will not know if this information is normally known to the tribal regulatory body, as it should be, or whether it was gathered in preparation for the petition.

The purpose of this rule is to allow the Commission to evaluate whether the tribal gaming operation maintains an adequate personnel system with records of all employees, as well as whether the tribe has complied with IGRA and NIGC regulations which require the tribe to submit to the Commission employee applications and background investigation reports for all key employees and primary management officials. The Commission must be able to check the records of all current employees against the employee applications and background investigation reports submitted to the Commission to determine whether the tribe has complied with IGRA. Although only key employees and primary management officials must be investigated and licensed under IGRA, the Commission believes the tribal gaming operation should maintain an adequate system of records for all employees, and the tribe may license other employees not specifically required to be licensed under IGRA.

One commenter pointed out that § 518.3(a)(3), which requires the tribe to submit a copy of the public notice references an incorrect citation to the provision which requires the public notice.

The Commission agrees. The reference to the public notice requirement should read ''25 CFR 518.5(d)'' instead of ''25 CFR 518.5(e).'' The Commission will make this change. In addition, the Commission has removed the requirement that the tribe, upon publication of the notice, submit a copy of the notice. The final regulation has been revised to require the tribe to submit an affidavit of publication in lieu of a copy of the publication.

One commenter stated, in regard to § 518.3(a)(4), that federal regulations governing the audit of tribal general funds and federal funds do not require the auditor to express an opinion on compliance with 25 U.S.C. 2710(b)(2)(B), and the proposed rule does not expressly contain a new substantive requirement for tribal audits. In addition, such a requirement could only be imposed prospectively.

The Commission agrees, and has removed this paragraph from § 518.3(a)(4). However, 25 U.S.C. 2710(b)(2)(B) requires that tribal gaming revenues be put to specific purposes. Therefore, the Commission adds a new paragraph to the section which describes the documents that should accompany the petition. The new paragraph is § 518.3(a)(1)(vii), and states ''A report, with supporting documentation, including a sworn statement signed by an authorized tribal official, which explains how tribal net gaming revenues were used in

accordance with the requirements of 25 U.S.C. 2710(b)(2)(B).'' Supporting documentation would include copies of pages from tribal accounting books which record the flow of money from the gaming operation to its ultimate use. One commenter questioned why the Commission would need to have access to the tribal audit under § 518.3(a)(2)(xi) in order to evaluate a tribe's qualification for certification. Because the new paragraph at § 518.3(a)(1)(vii) serves to inform the Commission of information it intended to glean from the tribal government audits, and because the Commission does not believe it necessary to review audits prepared of the tribal regulatory body, the Commission has removed § 518.3(a)(2)(xi) in its entirety.

Section 518.4 What Criteria Must a Tribe Meet To Be Issued a Certificate of Self-Regulation?

Several commenters pointed out that the proposed regulations state that the Commission ''may issue a certificate of self-regulation * * * .'' whereas IGRA provides that the Commission ''shall issue a certificate if the petitioning tribe meets the requirements.

The Commission recognizes this error and has changed the language in § 518.4(a) from ''may issue'' to ''shall issue''.

One commenter questioned the use of the words ''honest'' and ''dishonest'' in §§ 518.4(a)(1)(i)–(iii), and stated that, by this language, the Commission was creating a subjective criteria. This commenter questioned whether the Commission would look at actual criminal charges, or rely on mere word of mouth.

The language of this paragraph was taken verbatim from IGRA at 25 U.S.C. 2710(c)(4)(A). The Commission has created, by these regulations, a system for the evaluation of these and other statutory criteria. Section 518.4(b) provides several methods for establishing, by supporting documentation, that a tribe operates its gaming in a manner that satisfies the statutory criteria, including the ''honesty'' requirement mentioned in the statute.

One commenter recommended that the language of § 518.4(a)(2) be changed from ''Adopted and is implementing adequate systems'' to ''Adopted and has implemented adequate systems * * *'' This commenter believes that a gaming operation that has been in operation for three years should be required to have implemented the adequate systems, not be in the process of doing so.

The language the Commission used in § 518.4(a)(2) was taken directly from IGRA at 25 U.S.C. 2710(c)(4)(B). IGRA requires that the tribe has conducted its gaming for at least three years, and further requires that the tribe has adopted and is implementing adequate systems for accounting of revenues, investigation of violations, etc. Therefore, it only makes sense that those systems must have been in operation for at least three years, and that the tribe continues to implement those systems. The Commission does not read the language of the statute to mean that the tribe can qualify for a certificate if it is merely in the process of developing and implementing adequate control systems.

One commenter suggested that § 518.4(a)(4) could be construed to suggest that a tribe may not qualify as a result of a single minor violation, even if tribal authorities took prompt remedial action.

The Commission agrees that the language of proposed § 518.4(a)(4) creates an unreasonably high standard. Therefore, ''full'' has been deleted from this paragraph to allow the Commission the authority to determine whether or not violations are sufficiently serious to prevent a determination that a tribe is self-regulating.

One commenter suggested that the language of § 518.4(b)(1) should be read to mean that the tribally adopted minimum internal control standards do not necessarily have to be at least as stringent as Commission standards, or those of Nevada or New Jersey. This commenter believes that the test for receiving a class II certificate focuses on whether a tribe has achieved substantive compliance with IGRA, not on whether the Tribe's internal controls are at least as stringent as an externally promulgated standard adopted by the Commission. This commenter further believes that interim reliance on New Jersey or Nevada standards is flawed because those states did not adopt their minimum internal control standards based on IGRA's requirements for self-regulation.

The Commission disagrees with the commenter and believes that uniform standards are necessary for the industry. Minimum internal control standards commonly address categories of games and specific operational functions of gaming operations. Therefore, there is no immediate requirement for MICS based on standards that are specifically designed with IGRA in mind. The Commission has chosen the Nevada and New Jersey MICS as interim MICS because both have been in existence for a number of years and are regarded as comprehensive and effective standards. We note, however, that the State of Nevada is exempt from the currency transaction reporting required by the Bank Secrecy Act. Therefore, if Tribes adopt the Nevada MICS, they must modify them to comply with that Act. Furthermore, Commission regulations adopting MICS are currently being developed and promulgated by the Commission.

Another commenter suggested that the NIGC should include the minimum internal control standards provided to the NIGC by the National Indian Gaming Association (NIGA) as standards that a tribe may use until the Commission promulgates its own standards.

NIGA and the National Congress of American Indians have certainly set the standard for promoting the concept of internal controls and uniform MICS. The Commission commends them on the work done thus far in drafting uniform MICS. Those MICS, however, are still evolving and have not been adopted in final form. Therefore, the Commission believes it would be inappropriate to rely on those MICS at this time.

One commenter suggested that while several paragraphs of § 518.4(b)(3) indicate that the tribal regulatory body should be adopting and establishing a variety of standards for the operation of the gaming activity, some tribal regulatory bodies do not adopt these types of standards, but that such responsibility lies with the tribal council. This commenter suggested adding the language, ''if it does not already exist in the tribe's gaming ordinance'' to each subsection of § 518.4(b)(3) that indicates that the tribal regulatory body would be the entity to adopt or establish standards.

The Commission generally believes that the responsibility for the adoption and establishment of rules and standards for the operation of the gaming activity should be a function of the tribal regulatory body. Such responsibility would be evidence that the tribal regulatory body was functioning independently of the tribal council. In most governmental systems, regulatory agencies promulgate their own rules. However, the Commission will not deny a petition solely because a tribal council is responsible for the adoption of gaming rules, so long as there is evidence that the tribal regulatory body is nonetheless functioning independently. Because this paragraph deals with ''indicators'' that a tribe has met the self-regulation criteria, and not requirements, the Commission believes that revision is unnecessary.

One commenter noted that while § 518.4(b)(3)(iv) suggests that the tribal regulatory body performs routine audits

of the gaming operation, some tribal regulatory bodies may not perform financial audits independently of the annual audit required by IGRA, but may perform operational audits on a periodic basis. This commenter suggested adding ''operation or other'' after the word ''routine''.

The Commission agrees, and made the following change: The Commission has added ''operational or other'' after ''routine''.

One commenter suggested that some tribes do not require non-gaming employees to be licensed, and that the use in § 518.4(b)(3)(ix) of the language, ''all employees of the gaming activity'', suggests that all employees must be licensed, regardless of whether they work directly with the gaming activity. This commenter suggested that the language be amended to reflect that only those employees required to be licensed under IGRA or tribal law should be required by the tribal regulatory body to be licensed.

The Commission disagrees. Section 518.4(b) makes clear that the paragraphs that follow describe ''indicators'' that the Commission may evaluate to determine whether a tribe has met the criteria for self-regulation. These are not requirements that must be met in every instance. That said, the Commission would prefer that a tribal regulatory body, of its own accord, require licenses for all employees involved in the gaming activity, not just the key employees and primary management officials required by IGRA.

Vendor Licenses

A commenter suggested that § 518.4(b)(3)(xii) could be read to mean that the Commission would consider whether the tribal regulatory body issues licenses to all vendors that it deals with, including vendors of non-gaming related services, equipment and supplies. This commenter proposed amending this paragraph to add, ''on matters that may affect the honesty and integrity of the gaming activity'' after the word, ''operation.''

The Commission disagrees. Corrupting influences, which the IGRA was designed to prevent from infiltrating Indian gaming, and which can negatively affect the honesty and integrity of the gaming activity, can get a foothold through various vendor/vendee relationships. The Commission will consider, therefore, the extent to which the tribe investigates and issues licenses or permits to the people or organizations it does business with. This should not be read to mean that the tribe must be in the practice of issuing licenses to each and every entity it deals with, such as utility companies, but should have reasonable vendor licensing standards in place.

Posting of Rules of Games

A commenter stated that § 518.4(b)(3)(xiii), which provides that the Commission will consider whether the independent tribal regulatory body establishes or approves, and posts, rules of games, it too stringent. First, it does not recognize that some tribes require the gaming operation, not the regulatory body, to post rules, and second, that some game rules are too lengthy to post, but may be made available upon demand.

The Commission agrees with the first comment, and has revised the language to read, ''establishes or approves, and requires the posting of, rules of games.'' With respect to the second comment, the Commission believes that all rules should be posted, regardless of their length. However, because the posting of rules of the game is an indicator of self regulation, and not a requirement, the fact that a tribe does not post all rules, but makes some lengthy rules available upon demand, will not necessarily result in the denial of a certificate.

Video Surveillance

A commenter stated that with respect to § 518.4(b)(3)(xvi) some small operations may not require video surveillance, and that this paragraph should be amended to read, ''where video surveillance is required.''

As indicated earlier § 518.4(b) sets forth indicators that the Commission will consider when evaluating a petition. The Commission recognizes that operations vary in type and size, and a rigid set of rules would be unworkable. While the Commission favors the use of video surveillance, the small size of an operation, and its ability to otherwise effectively regulate the gaming activity, may mitigate against its use of video surveillance. The Commission will evaluate the need for video surveillance on a case-by-case basis.

Dispute Resolution Procedures

One commenter suggested that § 518.4(b)(3)(xviii), which provides that the Commission will consider whether adequate dispute resolution procedures exist, would require a tribe to waive its sovereign immunity. Another commenter suggested that a regulation requiring dispute resolution is not appropriate at this time.

The Commission disagrees. The Commission is not requiring that a tribe consent to be sued in order to obtain a certificate. The Commission will, however, consider whether there is an adequate system of dispute resolution. This could involve mediation or arbitration, in addition to a process for hearings before the tribal regulatory body, and a process for appeals to tribal court. Tribes are already required by 25 CFR 522.2(f) to have a description of procedures for resolving disputes between the gaming public and the tribe or the management contractor. Disputes between gaming employees and tribes has been an on going concern in Congress and in the public. This provision will enhance the perception that the gaming operation is run fairly and honestly. A dispute resolution process in no way imperils the sovereign immunity status of a tribe. Furthermore, there are certain times when a waiver of sovereign immunity may be warranted. For example, the United States has waived its immunity from suit under the Federal Tort Claims Act for suits against tortious acts of federal employees and tribal employees employed under the Indian Self-Determination Act.

Financial Stability

A commenter stated that § 518.4(b)(6), which provides that the Commission will consider the financial stability of the operation, is unworkable. This commenter believes that financial stability is not a useful measure of a tribe's ability to self-regulate because it may reflect only fluctuations in the market or changes in tribal policy to achieve legitimate governmental objectives, such as providing jobs for the community.

The financial stability of the operation is one of several indicators the Commission will evaluate. The Commission recognizes that the economic impact of tribal gaming operations can accrue to a tribe in various ways. While in many cases the primary economic benefit may be profits generated for the support of the tribal purposes specified in IGRA (25 U.S.C. 2710(b)(2)(B)), such as further economic development or the general welfare of the tribe, in other instances employment generated for tribal members by the gaming operation may be the primary economic benefit. Notwithstanding the extent of the operation's profitability, the operation must be adequately funded, by gaming revenues or other infusions the tribe may elect to provide, so that all required safeguards are maintained and standards are met. While the temporary fluctuation of some market conditions will be taken into consideration, in instances where financial instability poses a long-term threat to compliance with required

standards, self regulation certification will be withheld.

Clarification of § 518.4(d)

The Commission has added the language, ''During the review of the petition, '' to the beginning of § 518.4(d) to clarify when the provisions of this paragraph apply.

Section 518.5 What process will the Commission use to review petitions?

One commenter suggested a peer review process for the evaluation of petitions, with a team of people including those with Indian gaming regulatory experience, Commission staff, and outside auditors and consultants.

A peer review process may be an appropriate mechanism for evaluating petitions. The regulations do not have to mandate such a process, however, before the Commission can implement it. Furthermore, The Commission anticipates that it can, with the expansion of staff in the near future, adequately evaluate petitions for self-regulation. If the Commission finds it necessary and economical to contract for outside assistance or expertise to assist the Commission, it will do so.

A commenter stated that the NIGC should provide consultation and technical assistance to tribes to help them through the process.

The Commission intends to assist tribes in understanding and complying with all Commission regulations.

Establishment of Office of Self Regulation

To stream line the review process, the Commission has created an ''Office of Self Regulation'' (OSR). The Chairman of the Commission shall appoint one Commissioner to administer this office. The OSR will be responsible for the review and investigation process and will issue a report of its findings to the tribe. It will also issue certificates of self regulation, conduct hearings and issue decisions following those hearings. Those decisions will then be appealable to the full Commission, which shall decide the appeal based on the record. The tribe may request reconsideration by the full Commission of a denial of a petition. This process differs somewhat from the process described in the proposed rule. However, it provides an additional opportunity for tribes to challenge adverse decisions. The proposed rule provided for all determinations to be made by the Commission after an opportunity for a hearing, with the full Commission issuing a final decision on the petition. That decision was then subject to reconsideration. The process in these final regulations provides for initial decisions to be made by the Office of Self Regulation, after the opportunity for a hearing. Those decisions are then appealable to the full Commission, whose decision is then subject to reconsideration. Therefore, the tribe has the benefit of three levels of scrutiny of their petition instead of two.

Technical Changes

The Commission has combined the provisions of proposed §§ 518.5(e) and (f) into a new section 518.5 (e)(1) and (2) and renumbered the subsequent subsections. In addition, the Commission has added language to § 518.5(e)(1) which clarifies that, if the Office of Self Regulation determines that the tribe has satisfied the criteria, it shall so indicate in its report and shall issue a certificate.

The Commission has also inserted ''from the date of service of the report'' into § 518.5(e)(1) after ''the tribe shall have 60 days''. This relates to the deadline for submission of the tribe's written response, and clarifies when the 60 day time period starts.

Commission Deadlines

Several commenters requested express deadlines imposed on the Commission to complete the certification process. Commenters felt that IGRA does not give the Commission unlimited time to act upon a petition, and to be consistent with IGRA, regulations should impose meaningful restrictions on the time allowed the agency to decide petitions. A commenter also feels that the regulations should provide for a tribe to request a hearing at the time of the petition. One commenter suggested that the hearing should be scheduled for within 30 days of the request for a hearing, while another commenter suggested that the hearing should be held within 60 days of the date the Commission acknowledges the request for a hearing. One commenter suggested that § 518.5(i) should impose a deadline of 30 days following the hearing for the Commission to issue its decision, while another commenter suggested a 60 day deadline, and that if the Commission does not issue a decision within 60 days, the petition should be deemed approved. Without such a provision, the commenter is concerned that the Commission will not have incentive to complete its review in a timely manner.

While time frames can sometimes assure a more timely decision, the self-regulation process is a new, unique, and very important process. Thus, the Commission is not prepared to determine that 30–60 day time periods would be reasonable.

Timing of Request for Hearing

With respect to the right to a hearing, the regulations provide that the hearing can be requested at the time of a tribe's submission of its response to the Commission's report, instead of at the submission of the petition. The Commission designed the process this way because if the Commission issues a report that is favorable and indicates that it will issue a certificate, a hearing would be unnecessary. It is only after the Commission's report is issued that the need for a hearing will be evident. In the interest of time and expense for both the tribe and the Commission, the Commission will only honor a request for a hearing after the issuance of the Commission's report.

Information From Interested Parties

Two commenters suggested that § 518.5(c), which provides that the Commission may consider any evidence submitted by interested parties, could elicit a variety of inaccurate or incomplete responses from third parties. Both commenters further stated that any information obtained must be available for review by the Tribe, which should also have an opportunity to respond and to correct inaccurate or incomplete information before the Commission makes a final decision on the petition.

An important part of the process of determining a tribe's ability to self-regulate is the evaluation of information provided by individuals and entities in addition to information provided by the Tribe. The Commission will fully investigate any negative information, and will afford the Tribe a timely opportunity to respond to all such information on which it relies in making a determination. Therefore, the Commission has added the following language to § 518.5(c), ''The Commission shall make all such information on which it relies in making its determination available to the Tribe, and shall afford the Tribe an opportunity to respond.''

Public Notice Requirement

One commenter stated that negative backlash could result if the Tribe is required to publish the notice required by § 518.5(d) in a non-tribal newspaper.

This paragraph implements 25 U.S.C. 2710(c)(4)(A)(ii), which requires the Commission to determine if the Tribe has conducted its gaming in a manner which has resulted in a reputation for safe, fair, and honest operation of the gaming activity. To determine reputation, the Commission must

consider public opinion. The Commission understands the concern raised by this commenter and will give each response to the public notice its due weight. Sweeping criticism of Indian gaming will not be considered by the Commission in making its determination. The Commission is only interested in comment on specific issues relative to the Tribe's reputation for providing a safe, fair, and honest gaming environment.

Another commenter suggested that a better source of information would be the local United States Attorney for the district where the tribal gaming is operated, the Federal Bureau of Investigation, local police and the State's gaming regulatory agency.

The Commission agrees that these agencies may have information on the effectiveness of a particular Tribe's gaming regulation. During the course of its investigation of the petition, the Commission may confer with these agencies. Nonetheless, it is important for the general public to be aware of the Tribe's petition and to afford the public an opportunity to comment.

Final Agency Action

One commenter stated that § 518.5 should state expressly that the decision of the Commission to approve or deny a petition is a final agency action under 25 U.S.C. 2714.

The Commission agrees that the decision to approve or deny a petition is a final agency action, and that the decision to deny a petition is appealable under 25 U.S.C. 2714. The Commission therefore adds a new section 518.5(j) which states, ''The decision of the Commission to approve or deny a petition shall be a final agency action. A denial shall be appealable under 25 U.S.C. 2714, subject to the provisions of § 518.12. The Commission decision shall be effective when the time for the filing of a request for reconsideration pursuant to § 518.12 has expired and no request has been filed.''

Section 518.6 When will a certificate of self-regulation become effective?

Several commenters have argued that to require tribes to wait until the beginning of the next year for a certificate is unfair. Several commenters have argued that certificates should be made effective immediately, and one commenter has suggested a 30 day effective date. Another commenter suggested that certificates should become effective on the first day of the next quarter following the date the petition is granted. Still another commenter suggested that the Tribe should be permitted to choose which date their certificate becomes effective. One commenter points out that IGRA provides that ''during any year in which a Tribe has a certificate of self-regulation'' it is not subject to 25 U.S.C. 2706(b) and, in addition, the Commission may not assess a fee in excess of one quarter of one percent. This commenter believes that the proposed regulations directly contravene this language.

The Commission has concluded that the approach most clearly aligned with the statute is to provide for a January 1st effective date, with all benefits inuring to the tribe from that date forward. Self regulation status confers two types of benefits upon a tribe that holds a certificate; financial and a reduced regulatory role for the Commission with respect to that tribe. IGRA provides that ''during any year in which a tribe has a certificate'' it shall reap those benefits. 25 U.S.C. 2710 (c)(5). This language is ambiguous, as the reduction in the Commission's regulatory role can only apply prospectively, whereas the financial benefit is capable of retroactive application. The Commission powers apply only prospectively because the Commission will have already taken action before the determination on self regulation was made. Those actions can not be undone. Although the ''during any year'' language can be interpreted to mean ''for the entire year'', which would support an argument in favor of retroactive application of the financial benefits, it does not make sense to intepret the statute one way with respect to regulatory authority and another with respect to the financial incentive. Furthermore, the establishment of a January 1st effective date is consistent with Commission regulations and does not create an undue financial burden on tribes. For example, if a tribe applies in 1999 and a certificate is issued and made effective January 1, 2000, fee payments made by the tribe in 1999 would have been based on 1998 revenues pursuant to Commission regulations. Current fee regulations provide that fees are calculated based on the previous year's revenues. *See* 25 CFR 514.1(c)(5)(ii).

Furthermore, the establishment of a January 1st effective date is the most practical approach for the Commission to take. Fees are paid to the Commission quarterly based on the prior year's revenues. It would be impractical for the Commission to determine, on a case by case basis, what each self regulating tribe owes for the part of the year in which it was not self regulating, and how much it owes for the part of the year that it is self regulating. In addition, the Commission's budget is determined each year based on the amount of fees collected. If fees already paid were rebated based on a retroactive application of the statute, the budgetary process would be in a constant state of flux. This would make it difficult for the Commission to determine the amount of money available at any point in time to carry out its statutory duties.

The Commission has established a schedule for the submission of petitions that should ease the process and provide guidance to tribes. The process is as follows: To be considered for issuance of a certificate the following January, complete petitions are due no later than June 30 (Pursuant to § 518.5(b), the Commission shall notify a tribe, by letter, when it considers a petition to be complete.); petitions will be reviewed and investigated in chronological order based on the date of receipt of a complete petition; and the Commission will announce its determinations on December 1 for all those reviews and investigations it completes. This process encourages submission of petitions early in the calendar year to afford the Commission enough time to review and investigate the petition and to make a determination by December 1.

The Commission recognizes that under this schedule, the earliest a certificate will be effective is January 1, 2000. However, the Commission will accept petitions for the June 30, 1999 deadline starting immediately, and once these regulations become effective, the Commission will begin the process of reviewing and investigating petitions. Furthermore, it is unlikely, based on the extent and nature of these regulations, that the Commission would complete its review and investigation of a petition in time for a January 1, 1999, effective date. In addition, this schedule does not require tribes to wait an extra year for the financial benefit of self regulation because fees are calculated each year based on the prior year's revenues. Even though tribes must wait until January 1, 2000, for the first opportunity to obtain a certificate, any fees paid in 1999 will be based on 1998 revenues.

Section 518.7 If a tribe holds a certificate of self-regulation, is it required to report information to the Commission to maintain its self-regulatory status?

One commenter stated that IGRA does not require certified Tribes to repeatedly demonstrate that they are self-regulating. This commenter believes that such a requirement would be so onerous as to make a certificate not worthwhile. Another commenter stated that the report is as complex as the

original petition, and suggested the requirement of an annual report that only documents a change in status.

The Commission agrees that IGRA does not affirmatively require certified tribes to repeatedly demonstrate that they are self-regulating. However, IGRA vests the Commission with the power to remove a certificate. 25 U.S.C. 2710(c)(6). This power would be rendered meaningless unless the Commission is routinely informed that the tribe is continuing to meet the criteria for self regulation, particularly in light of the several powers of the Commission which are abrogated by the issuance of a certificate. (See 25 U.S.C. 2710(c)(5)(A)). The Commission does, however, share the concerns of the commenters that the reporting requirement may be unduly onerous and has therefore removed the language, ''with supporting documentation'' after ''such report shall set forth information''. By removing the requirement that the tribe submit supporting documentation with its annual report, the Commission intends to make the process of completing and submitting the report less onerous. While not requiring that the tribe supplement its annual report with documentation supporting each self regulation criteria, the Commission may require the tribe to supply supporting documentation if necessary. The Commission plans to provide guidance on how to prepare the report. In addition, the Commission has added ''and shall include an annual report, with supporting documentation, signed by an authorized tribal official, which shows that tribal net gaming revenues were used in accordance with the requirements of 25 U.S.C. 2710(b)(2)(B)'' after ''approval requirements of § 518.4''. This is the same type of report the Tribe must submit with its petition under § 518.3(a)(1)(vii).

Section 518.8. Does a tribe that holds a certificate of self regulation have a continuous duty to advise the Commission of any information?

One commenter stated that the requirement that a tribe advise the Commission of circumstances that may negatively impact on the tribe's ability to self regulate could be subject to wide-ranging interpretation as to what may be a negative impact. This commenter suggested that this section require a tribe to advise the Commission of any circumstances that may reasonably impact the tribe's ability to continue to self regulate.

The Commission generally agrees with this commenter. Therefore,to clarify that the tribe has a continuing duty to advise the Commission of circumstances that may cause the Commission to review the tribe's certification, and to clean up unnecessary language, the text of § 518.8. has been modified slightly. The following changes were made: delete ''at all times after the receipt of a certificate of self-regulation''; delete ''negatively impact on the tribe's ability to continue to self-regulate'' after ''may'' and add, ''reasonably cause the Commission to review the tribe's certificate of self regulation'; and delete ''may undermine a tribe's ability to effectively regulate'' after ''factors that'' and add ''are material to the decision to grant a certificate of self regulation.'' This change clarifies that the Commission expects to be notified of any significant circumstances that may affect a tribes certificate of self regulation.

Section 518.9 Are any of the investigative or enforcement powers of the Commission limited by the issuance of a certificate of self-regulation?

One commenter suggested that the language of § 518.9 is misleading because it does not take into account the language of IGRA at 2710(c)(5)(a) which states that certain provision of IGRA do not apply to self-regulated tribes.

The Commission agrees, and therefore adds the following language to the beginning of § 518.9, '' Subject to the provisions of 25 U.S.C. 2710(c)(5)(A),''

Section 518.10 Under what circumstances may the Commission remove a certificate of self-regulation?

One commenter stated that this paragraph should indicate that a decision to remove a certificate is appealable to Federal District Court.

The Commission agrees and adds to § 518.10 the following: ''The decision to remove a certificate is appealable to Federal District Court pursuant to 25 U.S.C. 2714.''

Section 518.12 May a tribe request reconsideration by the Commission of a denial of a petition or a removal of a certificate of self-regulation?

One commenter suggested that § 518.12 should state that a request for reconsideration reopens the matter before the Commission, and that until action on the request is complete, the prior decision of the Commission is not a final agency action.

The Commission has clarified this paragraph by adding § 518.5 (j) which provides that if a request for reconsideration has been filed within 30 days of the denial or removal, the Commission's original decision is not final agency action.

The Commission has further clarified § 518.12 because it was not clear whether the Commission would decide within 30 days whether to grant the request for reconsideration, or whether the Commission would decide the request on its merits. Therefore, the Commission has added the word, ''final'' before the word, ''decision and has removed the language, ''with regard to any request for reconsideration'' from the second to last sentence. The Commission will make its final decision within 30 days.

One commenter stated that the failure of the Commission to issue a decision on reconsideration within 30 days should result in the automatic approval, not disapproval, of the request. This commenter suggests that the automatic disapproval provision discourages the timely resolution of requests for reconsideration.

The Commission disagrees. By allowing for reconsideration of a decision to deny a petition or remove a certificate, the Commission is affording a Tribe a second opportunity to make its case. There is no statutory right to reconsideration, and therefore no prescribed deadline for such decision. The Commission has, however, provided for a 30 day deadline. If no decision issues within 30 days, the Tribe will know by the 31st day that the request was not approved. There is, therefore, no real threat of continued inaction by the Commission.

Several grammatical changes were made to the proposed regulations. These changes have no substantive effect.

Regulatory Matters

Paperwork Reduction Act

On May 2, 1998, the Commission received notice that the Office of Management and Budget approved its information collection system, and assigned it number 3141–0008. This approval expires on May 31, 2001.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Commission has determined that this rule will not have a significant economic impact on a substantial number of small entities. Because this rule is procedural in nature, it will not impose substantive requirements that could be deemed impacts within the scope of the Act.

National Environmental Policy Act

The Commission has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and

that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

List of Subjects in 25 CFR Part 518

Administrative practice and procedure, Gambling, Indians—lands, Indians—tribal government, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commission amends 25 CFR chapter III by adding part 518 to read as follows:

PART 518—SELF REGULATION OF CLASS II GAMING

Sec.

Authority: 25 U.S.C. 2706(b)(10), 2710(c)(3)–(6).

§ 518.1 What does this part cover?

This part sets forth requirements for obtaining, and procedures governing, the Commission's issuance of certificates of self-regulation of class II gaming operations under 25 U.S.C. 2710(c). When the Commission issues a certificate of self-regulation, the certificate is issued to the tribe, not to a particular gaming operation; the certificate will apply to all class II gaming operations operated by the tribe that holds the certificate.

§ 518.2 Who may petition for a certificate of self-regulation?

A tribe may submit to the Commission a petition for self-regulation of class II gaming if, for the three (3) year period immediately preceding the date of its petition:

(a) The tribe has continuously conducted the gaming activity for which it seeks self-regulation;

(b) All gaming that the tribe has engaged in, or licensed and regulated, on Indian lands within the tribe's jurisdiction, is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by federal law), in accordance with 25 U.S.C. 2710(b)(1)(A);

(c) The governing body of the tribe has adopted an ordinance or resolution that the Chairman has approved, in accordance with 25 U.S.C. 2710(b)(1)(B);

(d) The tribe has otherwise complied with the provisions of 25 U.S.C. 2710; and

(e) The gaming operation and the tribal regulatory body have, for the three years immediately preceding the date of the petition, maintained all records required to support the petition for self-regulation.

§ 518.3 What must a tribe submit to the Commission as part of its petition?

(a) A petition for a certificate of self-regulation under this part shall contain:

(1) Two copies on 8–1/2'' X 11'' paper of a petition for self-regulation approved by the governing body of the tribe and certified as authentic by an authorized tribal official, which includes:

(i) A brief history of each gaming operation(s), including the opening dates and periods of voluntary or involuntary closure;

(ii) An organizational chart of the independent tribal regulatory body;

(iii) A description of the process by which all employee and regulator positions at the independent tribal regulatory body are filled, including qualifying and disqualifying criteria;

(iv) A description of the process by which the independent tribal regulatory body is funded and the funding level for the three years immediately preceding the date of the petition;

(v) A list of the current regulators and employees of the independent tribal regulatory body, their titles, the dates they began employment, and, if serving limited terms, the expiration date of such terms;

(vi) A list of the current gaming operation division heads; and

(vii) A report, with supporting documentation, including a sworn statement signed by an authorized tribal official, which explains how tribal net gaming revenues were used in accordance with the requirements of 25 U.S.C. 2710(b)(2)(B);

(2) A descriptive list of the documents maintained by the tribe, together with an assurance that the listed documents or records are available for the Commission's review for use in determining whether the tribe meets the eligibility criteria of § 518.2 and the approval criteria of § 518.4, which shall include but is not limited to:

(i) The tribe's constitution or other governing documents;

(ii) If applicable, the tribe's revenue allocation plan pursuant to 25 U.S.C. 2710(b)(3);

(iii) A description of the accounting system(s) at both the gaming operation and the tribe that account for the flow of the gaming revenues from receipt to their ultimate use, consistent with IGRA;

(iv) Manual(s) of the internal control systems of the gaming operation(s);

(v) A description of the record keeping system for all allegations of criminal or dishonest activity for the three (3)-year period immediately preceding the date of the petition, and measures taken to resolve the allegations;

(vi) A description of the record keeping system for all investigations, enforcement actions, and prosecutions of violations of the tribal gaming ordinance or regulations, for the three (3)-year period immediately preceding the date of the petition, including dispositions thereof;

(vii) A description of the personnel record keeping system of all current employees of the gaming operation(s);

(viii) The dates of issuance, and criteria for the issuance of tribal gaming licenses issued for each place, facility or location at which gaming is conducted; and

(ix) The tribe's current set of gaming regulations; and

(3) A copy of the public notice required under 25 CFR 518.5(d) and a certification, signed by a tribal official, that it has been posted. Upon publication of the notice in a local newspaper, the tribe shall forward an affidavit of publication to the Commission.

§ 518.4 What criteria must a tribe meet to receive a certificate of self-regulation?

(a) The Commission shall issue a certificate of self-regulation if it determines that the tribe has, for the three years immediately preceding the petition:

(1) Conducted its gaming activity in a manner that:

(i) Has resulted in an effective and honest accounting of all revenues;

(ii) Has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) Has been generally free of evidence of criminal or dishonest activity;

(2) Adopted and is implementing adequate systems for:

(i) Accounting of all revenues from the activity;

(ii) Investigation, licensing and monitoring of all employees of the gaming activity; and

(iii) Investigation, enforcement and prosecution of violations of its gaming ordinance and regulations;

(3) Conducted the operation on a fiscally and economically sound basis; and

(4) The gaming activity has been conducted in compliance with the IGRA, NIGC regulations in this chapter, and the tribe's gaming ordinance and gaming regulations.

(b) Indicators that a tribe has met the criteria set forth in paragraph (a) of this section may include, but are not limited to:

(1) Adoption and implementation of minimum internal control standards which are at least as stringent as those promulgated by the Commission, or until such standards are promulgated by the Commission, minimum internal control standards at least as stringent as those required by the State of Nevada or the State of New Jersey;

(2) Evidence that suitability determinations are made with respect to tribal gaming regulators which are at least as stringent as those required for key employees and primary management officials of the gaming operation(s);

(3) Evidence of an established independent regulatory body within the tribal government which:

(i) Monitors gaming activities to ensure compliance with federal and tribal laws and regulations;

(ii) Promulgates tribal gaming regulations pursuant to tribal law;

(iii) Ensures that there is an adequate system for accounting of all revenues from the activity and monitors such system for continued effectiveness;

(iv) Performs routine operational or other audits of the gaming operation(s);

(v) Routinely receives and reviews accounting information from the gaming operation(s);

(vi) Has access to and may inspect, examine, photocopy and audit all papers, books, and records of the gaming operation(s);

(vii) Provides ongoing information to the tribe on the status of the tribe's gaming operation(s);

(viii) Monitors compliance with minimum internal control standards for the gaming operation;

(ix) Adopts and implements an adequate system for investigation, licensing, and monitoring of all employees of the gaming activity;

(x) Maintains records on licensees and on persons denied licenses including persons otherwise prohibited from engaging in gaming activities within the tribe's jurisdiction;

(xi) Inspects and examines all premises where gaming is conducted;

(xii) Establishes standards for and issues vendor licenses or permits to persons or entities who deal with the gaming operation, such as manufacturers and suppliers of services, equipment and supplies;

(xiii) Establishes or approves, and requires the posting of, rules of games;

(xiv) Inspects games, tables, equipment, cards, and chips or tokens used in the gaming operation(s);

(xv) Establishes standards for technological aids and tests such for compliance with standards;

(xvi) Establishes or approves video surveillance standards;

(xvii) Adopts and implements an adequate system for the investigation of possible violations of the tribal gaming ordinance and regulations and takes appropriate enforcement actions;

(xviii) Determines that there are adequate dispute resolution procedures for gaming operation employees and customers, and ensures that such system is adequately implemented; and

(xix) Takes testimony and conducts hearings on regulatory matters, including matters related to the revocation of primary management officials and key employee licenses;

(4) Documentation of a sufficient source of permanent and stable funding for the independent tribal regulatory body which is allocated and appropriated by the tribal governing body;

(5) Adoption of a conflict of interest policy for the regulators/regulatory body and their staff;

(6) Evidence that the operation is financially stable;

(7) Adoption and implementation of a system for adequate prosecution of violations of the tribal gaming ordinance and regulations, which may include the existence of a tribal court system authorized to hear and decide gaming related cases;

(8) Evidence that the operation is being conducted in a safe manner, which may include, but not be limited to:

(i) The availability of medical, fire, and emergency services;

(ii) The existence of an evacuation plan; and

(iii) Proof of compliance with applicable building, health, and safety codes; and

(9) Evidence that reports are produced or received by the tribe, the tribal regulatory body, or the gaming operation based on an evaluation of the internal controls of the gaming operation during the three (3) year period immediately preceding the date of the petition.

(c) The burden of establishing self-regulation is upon the tribe filing the petition.

(d) During the review of the petition,—the Commission shall have complete access to all areas of and all papers, books, and records of the tribal regulatory body, the gaming operation, and any other entity involved in the regulation or oversight of the gaming operation. The Commission shall be allowed to inspect and photocopy any relevant materials. The tribe shall take no action to prohibit the Commission from soliciting information from any current or former employees of the tribe, the tribal regulatory body, or the gaming operation. Failure to adhere to this paragraph may be grounds for denial of a petition for self-regulation.

§ 518.5 What process will the Commission use to review petitions?

(a) The Chairman shall appoint one Commissioner to administer the Office of Self Regulation. The Office of Self Regulation shall undertake an initial review of the petition to determine whether the tribe meets all of the eligibility criteria of § 518.2. If the tribe fails to meet any of the eligibility criteria, the Office of Self Regulation shall deny the petition and so notify the tribe. If the tribe meets all of the eligibility criteria, the Office of Self Regulation shall review the petition and accompanying documents for completeness. If the Office of Self Regulation finds the petition incomplete, it shall immediately notify the tribe by letter, certified mail, return receipt requested, of any obvious deficiencies or significant omissions apparent in the petition and provide the tribe with an opportunity to submit additional information and/or clarification.

(b) The Office of Self Regulation shall notify a tribe, by letter, when it considers a petition to be complete.

(c) Upon receipt of a complete petition, the Office of Self Regulation shall conduct a review and investigation to determine whether the tribe meets the approval criteria under § 518.4. During the course of this review, the Office of Self Regulation may request from the tribe any additional material it deems necessary to assess whether the tribe has met the requirements for self-regulation. The tribe shall provide all information

requested by the Office of Self Regulation in a timely manner. The Office of Self Regulation may consider any evidence which may be submitted by interested or informed parties. The Office of Self Regulation shall make all such information on which it relies in making its determination available to the Tribe and shall afford the Tribe an opportunity to respond.

(d) The tribe shall post a notice, contemporaneous with the filing of the petition, advising the public that it has petitioned the Commission for a certificate of self regulation. Such notice shall be posted in conspicuous places in the gaming operation and the tribal government offices. Such notice shall remain posted until the Commission either issues a certificate or declines to do so. The tribe shall also publish such notice, once a week for four weeks, in a local newspaper with a broad based circulation. Both notices shall state that one of the criteria for the issuance of a certificate is that the tribe has a reputation for safe, fair, and honest operation of the gaming activity, and shall solicit comments in this regard. The notices shall instruct commentors to submit their comments directly to the Office of Self Regulation, shall provide the mailing address of the Commission and shall request that commentors include their name, address and day time telephone number.

(e) After making an initial determination on the petition, the Office of Self Regulation shall issue a report of its findings to the tribe.

(1) If the Office of Self Regulation determines that the tribe has satisfied the criteria for a certificate of self regulation, it shall so indicate in its report and shall issue a certificate in accordance with 25 CFR 518.6.

(2) If the Office of Self Regulation's initial determination is that a tribe has not met the criteria for a certificate of self regulation, it shall so advise the tribe in its report and the tribe shall have 60 days from the date of service of the report to submit to the Office of Self Regulation a written response to the report. This response may include additional materials which:

(i) The tribe deems necessary to adequately respond to the findings; and

(ii) The tribe believes supports its petition.

(f) At the time of the submission of its response the tribe may request a hearing before the Office of Self Regulation. This request shall specify the issues to be addressed by the tribe at such hearing, and any proposed oral or written testimony the tribe wishes to present. The Office of Self Regulation may limit testimony.

(g) The Office of Self Regulation shall notify the tribe, within 10 days of receipt of such request, of the date and place of the hearing. The Office of Self Regulation shall also set forth the schedule for the conduct of the hearing, including the specification of all issues to be addressed at the hearing, the identification of any witnesses, the time allotted for testimony and oral argument, and the order of the presentation.

(h) Following review of the tribe's response and the conduct of the hearing, the Office of Self Regulation shall issue a decision on the petition. The decision shall set forth with particularity the findings with respect to the tribe's compliance with standards for self-regulation set forth in this part. If the Office of Self Regulation determines that a certificate will issue, it will do so in accordance with 25 CFR 518.6.

(i) The decision to deny a petition shall be appealable to the full Commission. Such appeal shall be received by the Commission within thirty (30) days of service of the decision and shall include a supplemental statement that states with particularity the relief desired and the grounds therefor. The full Commission shall decide the appeal based only on a review of the record before it. The decision on appeal shall require a majority vote of the Commissioners.

(j) The decision of the Commission to approve or deny a petition shall be a final agency action. A denial shall be appealable under 25 U.S.C. 2714, subject to the provisions of § 518.12. The Commission decision shall be effective when the time for the filing of a request for reconsideration pursuant to § 518.12 has expired and no request has been filed.

§ 518.6 When will a certificate of self-regulation become effective?

A certificate of self-regulation shall become effective on January 1 of the year following the year in which the Commission determines that a certificate will issue. Complete petitions are due no later than June 30. No petitions will be considered for the following January 1 effective date that have not been received by June 30 of the previous year. Petitions will be reviewed and investigated in chronological order based on the date of receipt of a complete petition. The Commission will announce its determinations on December 1 for all those reviews and investigations it completes.

§ 518.7 If a tribe holds a certificate of self-regulation, is it required to report information to the Commission to maintain its self-regulatory status?

Yes. Each tribe that holds a certificate of self-regulation shall be required to submit a self-regulation report annually to the Commission in order to maintain its self-regulatory status. Such report shall set forth information to establish that the tribe has continuously met the eligibility requirements of § 518.2 and the approval requirements of § 518.4 and shall include a report, with supporting documentation, including a sworn statement signed by an authorized tribal official, which explains how tribal net gaming revenues were used in accordance with the requirements of 25 U.S.C. 2710(b)(2)(B)''. The annual report shall be filed with the Commission on April 15th of each year following the first year of self-regulation. Failure to file such report shall be grounds for the removal of a certificate under § 518.8.

§ 518.8 Does a tribe that holds a certificate of self-regulation have a continuing duty to advise the Commission of any information?

Yes. A tribe that holds a certificate of self-regulation has a continuing duty to advise immediately the Commission of any circumstances that may reasonably cause the Commission to review the tribe's certificate of self-regulation. Failure to do so is grounds for removal of a certificate of self-regulation. Such circumstances may include, but are not limited to: a change in management contractor; financial instability; or any other factors that are material to the decision to grant a certificate of self regulation.

§ 518.9 Are any of the investigative or enforcement powers of the Commission limited by the issuance of a certificate of self-regulation?

No. Subject to the provisions of 25 U.S.C. 2710(c)(5)(A) the Commission retains its investigative and enforcement powers over all class II gaming tribes notwithstanding the issuance of a certificate of self-regulation. The Commission shall retain its powers to investigate and bring enforcement actions for violations of the Indian Gaming Regulatory Act, accompanying regulations, and violations of tribal gaming ordinances.

§ 518.10 Under what circumstances may the Commission remove a certificate of self-regulation?

The Commission may, after an opportunity for a hearing, remove a certificate of self-regulation by a majority vote of its members if it determines that the tribe no longer

meets the eligiblity criteria of § 518.2, the approval criteria of § 518.4, the requirements of § 518.7 or the requirements of § 518.8. The Commission shall provide the tribe with prompt notice of the Commission's intent to remove a certificate of self-regulation under this Part. Such notice shall state the reasons for the Commission's action and shall advise the tribe of its right to a hearing under § 518. 11. The decision to remove a certificate is appealable to Federal District Court pursuant to 25 U.S.C. 2714.

§ 518.11 May a tribe request a hearing on the Commission's proposal to remove its certificate?

Yes. A tribe may request a hearing regarding the Commission's proposal to remove a certificate of self regulation under § 518.10. Such a request shall be filed with the Commission within thirty (30) days after the tribe receives notice of the Commission's action. Failure to request a hearing within the time provided by this section shall constitute a waiver of the right to a hearing.

§ 518.12 May a tribe request reconsideration by the Commission of a denial of a petition or a removal of a certificate of self-regulation?

Yes. A tribe may file a request for reconsideration of a denial of a petition or a removal of a certificate of self-regulation within 30 days of receipt of the denial or removal. Such request shall set forth the basis for the request, specifically identifying those Commission findings which the tribe believes to be erroneous. The Commission shall issue a final decision within 30 days of receipt of the request. If the Commission fails to issue a decision within 30 days, the request shall be considered to be disapproved.

Authority and Signature

This Final Rule was prepared under the direction of Tadd Johnson, Chairman, National Indian Gaming Commission, 1441 L. St. N.W., Suite 9100, Washington, D.C. 20005.

Signed at Washington, D.C. this 29th day of July, 1998.

Tadd Johnson,

Chairman.

[FR Doc. 98–20723 Filed 8–5–98; 8:45 am]

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DEPARTMENT OF DEFENSE

48 CFR Parts 205, 206, 217, 219, 225, 226, 236, 252, and 253

[DFARS Case 98–D007]

Defense Federal Acquisition Regulation Supplement; Reform of Affirmative Action in Federal Procurement

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) guidance concerning programs for small disadvantaged business (SDB) concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement, and are consistent with the changes made to the Federal Acquisition Regulation (FAR) in Federal Acquisition Circular (FAC) 97–06. DoJ's proposal is designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand Constructors, Inc.* v. *Pena,* 115 S. Ct. 2097 (1995).

DATES: *Effective Date:* October 1, 1998.

Applicability Date: The policies, provisions, and clauses of this interim rule are effective for all solicitations issued on or after October 1, 1998.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before October 5, 1998, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Ms. Susan Schneider, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062, telefax (703) 602–0350.

E-mail comments submitted over the Internet should be addressed to: dfarsacq.osd.mil

Please cite DFARS Case 98–D007 in all correspondence related to this issue. E-mail comments should cite DFARS Case 98–D007 in the subject line.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Schneider, PDUSD (A&T) DP (DAR), (703) 602–0131, or Mr. Mike Sipple, PDUSD (A&T) DP (CPA), (703) 695–8567. Please cite DFARS Case 98–D007.

SUPPLEMENTARY INFORMATION:

A. Background

In *Adarand,* the Supreme Court extended strict judicial scrutiny to Federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any Federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling Government interest.

DoJ developed a proposed structure to reform affirmative action in Federal procurement designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand.* The DoJ proposal was published for public notice and comment (61 FR 26042, May 23, 1996). DoJ issued a notice that provided a response to the public comments (62 FR 25648, May 9, 1997). To implement the DoJ concept, two interim FAR rules were issued: FAC 97–06, effective October 1, 1998, implements a price evaluation adjustment for SDB concerns (63 FR 35719, June 30, 1998); and FAC 97–07, effective January 1, 1999, implements an SDB participation program (63 FR 36120, July 1, 1998). This interim rule contains the revisions necessary to conform the DFARS to the interim FAR rule in FAC 97–06, and to the DoJ proposal implemented by the FAR rule. Subsequent revisions will be issued to conform the DFARS to the interim FAR rule in FAC 97–07.

B. Regulatory Flexibility Act

This interim rule is not excepted to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because most of the changes merely conform the DFARS to the FAR rule in FAC 97–06. Two source selection considerations for SDB concerns currently in the DFARS, but not in the FAR, are amended by this rule to conform to the DoJ model: Leader company contracting (DFARS 217.401); and architect-engineer (A–E) services (DFARS 236.602). These two changes are not expected to have a significant economic impact on a substantial number of small entities since (1) leader company contracting is infrequently used by DoD; and (2) the primary factor in A–E selection is the determination of the most highly qualified firm; the SDB consideration is one of several secondary source selection factors. Therefore, an initial regulatory flexibility analysis has not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance