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Beatrice Ezerski,
Secretary to the Board.
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Part II

National Indian Gaming Commission

25 CFR Parts 501 et al.

Purpose and Scope; Service; Approval of Class II and Class III Gaming Ordinances; Background Investigations and Gaming Licenses Under the Indian Gaming Regulatory Act; Privacy Act Procedures; Management Contract Requirements and Procedures Under the Indian Gaming Regulatory Act; Compliance and Enforcement Procedures Under the Indian Gaming Regulatory Act; Final Rules

NATIONAL INDIAN GAMING COMMISSION

25 CFR Parts 501, 519, 522, 523, 524, 556, 558

RIN 3141–AA01

Purpose and Scope; Service; Approval of Class II and Class III Gaming Ordinances; Background Investigations and Gaming Licenses Under the Indian Gaming Regulatory Act

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission is establishing this rule in chapter III in title 25 of the Code of Federal Regulations (Parts 500–599). This rule provides a purpose and scope, procedures for service of Commission determinations, requirements for submitting new and existing gaming ordinances to the Chairman for approval, requirements for background investigations on primary management officials and key employees, and requirements for licensing employees of an Indian gaming operation. Elsewhere in today's **Federal Register**, the Commission is establishing procedures under the Privacy Act. The Commission previously established an Indian Gaming Individuals Record System.

EFFECTIVE DATE: February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Mary Jane Markley, National Indian Gaming Commission, suite 250, 1850 M Street, NW., Washington, DC 20036–5083; telephone: 202–632–7032.

SUPPLEMENTARY INFORMATION:

Background

The Indian Gaming Regulatory Act (IGRA, or the Act), 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The IGRA established the National Indian Gaming Commission (NIGC, or the Commission). Under the IGRA, the Commission is charged with regulating class II gaming and certain aspects of class III gaming. On Wednesday, July 8, 1992, the Commission proposed regulations for service, approval of class II and class III gaming ordinances, and Privacy Act procedures. 57 FR 30346–30357. The Commission requested comments on those proposed regulations. In addition, the Commission provided notice that it was establishing a system of records under the Privacy Act. 57 FR 30358–30359. Below is the Commission's analysis of the comments received and the texts of the final service and ordinance regulations. Additionally, the Commission has added a new part, part 501, Purpose and scope of this chapter.

General Comments

One commenter questioned the Commission's "piecemeal approach" to rulemaking. This commenter was concerned that commenters had to comment on "separate pieces of a big puzzle without knowing what the 'big picture' looks like." The Commission disagrees. During the comment period for the ordinance and Privacy Act regulations (July 8 through August 24, 1992), the Commission also proposed compliance and enforcement regulations (57 FR 30584, July 9, 1992) and management contract regulations (57 FR 37656, August 19, 1992). Additionally, the Commission had previously promulgated fee regulations (56 FR 40702, August 15, 1991) and definitions regulations (57 FR 12382, April 9, 1992). Those regulations form key pieces of the Commission's regulatory program and they were available during this rulemaking. The Commission plans to provide a set of its regulations along with preambles so that interested persons may have ready reference to the regulations and the Commission's explanations for them.

The same commenter also questioned the Commission's rejection of negotiated rulemaking, stating that use of that process would avoid litigation. In the view of the Commission, because Congress spelled out specific requirements that the Commission could not ignore, negotiated rulemaking was not suitable. Furthermore, commenters have had ample opportunity to review, comment on, and discuss with Commissioners and staff the Commission's thinking with respect to the ordinance regulations. Those regulations have been available since December 1991 in working draft form.

Another commenter asked whether tribes having ordinances that complied with Bureau of Indian Affairs' (BIA) useful guidance that was issued on March 5, 1992, would need to revise those ordinances and procedures to conform to the Commission's regulations. To the extent that there are additional requirements or conflicts tribes must change their ordinances. Tribes are free, however, to adopt procedures more stringent than those set out in parts 522, 523, 556, and 558. Under the ordinance regulations, the background investigation requirements for class II gaming and for class III gaming (where a compact allocates such responsibility to a tribe) are the responsibility of a tribe.

Part 501—Purpose and Scope of this Chapter

To clarify that the requirements under the IGRA and this chapter do not preempt tribal ordinances and regulations that do not conflict with the IGRA, this chapter, or a compact, the Commission has added a new part 501, Purpose and scope of this chapter. There, the Commission spells out the overlapping jurisdictions of a tribe, the regulations of the Commission with respect to gaming on Indian lands and the applicability of state law under a compact for class III gaming. Tribes are free to add their own requirements in regulating Indian gaming so long as those requirements are not in conflict with nor are less stringent than the requirements under the IGRA, the regulations of chapter III of the C.F.R., or a compact for class III gaming.

Jurisdiction, as spelled out in § 501.2(b) for class I gaming, implements section 2710(a)(1). Jurisdiction, as spelled out in § 501.2(c) for class II gaming, implements section 2710(a)(2). Jurisdiction, as spelled out in § 501.2(d) for class III gaming, implements section 2710(d)(5).

Part 519—Service

Fax failure

A commenter noted that appeal deadlines could be missed in the event of failure of a fax machine to receive a transmission under § 519.3(a)(5). In this commenter's view, that could happen because the service regulation provides that service by facsimile is complete upon transmission (as opposed to receipt). The commenter stated that a fax machine could be out of ink at the time a fax was sent and therefore not receive a fax. The Commission believes that it has adopted adequate safeguards in the event of fax failure. First, the Commission will send copies of its notices to three entities in addition to the entity being served: The tribal chairman, the designated tribal agent and the relevant tribal gaming authority. Second, after such transmission the Commission's fax machine tells it whether the transmission was successful. If the fax machine tells the Commission that a transmission was not successful, service would not be complete. In that case, the Commission would serve a document by other means. Third, the Commission plans to confirm service by telephoning the receiving office.

Syntax

The Commission modified slightly the language of § 519.3(a)(5) by inserting "Transmitting a" before "facsimile."

This modification makes (a)(5) parallel to the other items under subparagraph (a).

Service of entities

One commenter requested that the Commission define "person" in part 519 to include "entities." Apparently, the commenter was concerned that entities other than natural persons be served. Under § 519.1 a tribe must designate an agent for service. Similarly, under § 519.2, a tribal operator or management contractor must also designate such an agent. By designating agents, entities that are not natural persons may be served.

Clarification of § 519.4 with respect to timeliness and certainty

Several commenters were concerned that copies to tribal officials be timely and certain. In response to those commenters' concerns, the Commission clarified § 519.4. First, the Commission deleted "When practicable" from the beginning of the sentence. Second, the Commission deleted "send" and inserted in its place "transmit" to indicate copies could be delivered by a method other than the mail. Third, the Commission added a new sentence to read: "The Commission shall transmit each copy as expeditiously as possible." Finally, to clarify the separation of service from providing copies to tribal officials, the Commission added another sentence to read: "Service under § 519.3 shall not depend on a copy being sent to the appropriate tribal chairman, the designated tribal agent, or to the relevant tribal gaming authority." With these clarifications, the Commission believes it has answered the timeliness and certainty concerns expressed by several commenters.

Part 522—Submission of Gaming Ordinance or Resolutions

State law issues

One commenter suggested that part 522 require that each class II game be authorized by the laws of the state in which the gaming would be conducted. That same commenter suggested that with respect to the card games under section 2703(A)(ii), if a tribe conducted a card game inconsistent with State law or regulation, that such conduct should constitute grounds for disapproval of an ordinance or resolution. The Commission disagrees. In the view of the Commission, approval of an ordinance does not authorize the playing of certain games. Nor should disapproval of an ordinance be a vehicle for indicating disagreement with a tribe on a matter of interpretation of state law. In its approvals, the Commission plans to include a disclaimer concerning the legality of whether and how specific games may be conducted. The Commission views illegally played games as a matter for enforcement, both by the Commission and under 18 U.S.C. 1166.

Class III gaming under procedures prescribed by the Secretary

A commenter suggested amending § 522.2(e) to indicate that class III gaming may be authorized under procedures that are prescribed by the Secretary of the Interior under section 2710(d)(7)(B)(vii). The Commission agrees and has therefore added after "compact," "or procedures as prescribed by the Secretary."

Fingerprints

Some commenters suggested requiring fingerprints, stating that fingerprints are a basic tool for law enforcement authorities in identifying individuals who are using false identities and who may supply false information. The Commission agrees and therefore has added § 522.2(h) to provide for the orderly collection of fingerprints of key employees and primary management officials. The Commission has also added § 556.4(a)(14) to require that tribes obtain fingerprints from applicants for key employee and primary management official positions. The Commission plans to help any tribe that may need guidance in setting up procedures to ensure the integrity of the fingerprinting process. Tribes that have previously worked with the Bureau of Indian Affairs in obtaining criminal history checks may wish to continue doing so. Regarding the requirement in § 522.2(h) that a criminal history check must include a check through the FBI National Criminal Information Center, the Commission encourages additional criminal history checks through tribal, local and state systems, but does not require them.

Submission requirements issues

Some commenters questioned the authority of the Commission to require submission of various procedures under § 522.2, stating that the IGRA does not require such submissions. The Commission disagrees. Authority to request the various procedures is contained in the IGRA, contrary to assertions of the commenters. First, section 2710(b)(2) states that the Chairman shall approve an ordinance if it includes certain required provisions and if there is an "adequate system" that includes, among other things, background investigations and licensing. Hence the Commission's requirements for submission of such procedures. Second, concerning procedures for dispute resolution, Congress included among the IGRA's purposes to assure "that gaming is conducted fairly and honestly by both the operator and the players." Section 2702(2) The Commission's requirement to submit dispute resolution procedures implements that purpose. Third, section 2706(b)(10) grants the Commission power to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of (the IGRA)." Because the procedures in question implement specific purposes and requirements of the IGRA and because the IGRA grants the Commission power to promulgate necessary regulations, the Commission rejects the suggestions that such procedures are beyond its authority.

One commenter suggested adding to the existing submission requirements in § 522.2 "any other documents, papers, reports, or other information deemed relevant by the Chairman." In the commenter's view, that addition would afford the Commission the flexibility to require any other information needed to facilitate a complete review of an ordinance without having to amend the applicable regulation. The Commission believes that the information requirements as set out in the IGRA and the regulations are sufficient for the Chairman to make an informed decision in approving or disapproving an ordinance. Therefore the Commission rejects the suggestion.

The same commenter suggested requiring a form for submission of ordinances under part 522. The Commission rejects that suggestion for now because the requirements are explicit without a form. Additionally, supplying ordinances and descriptions of various procedures does not lend itself to forms.

Another commenter questioned the Commission's requiring submission of a copy of a tribal-state compact under § 522.2(e), stating that such a requirement was "an unnecessary expense and waste of paper." The Commission disagrees. In reviewing class III ordinances, the Chairman needs an up-to-date compact so he or she may ascertain how jurisdiction is allocated for background investigations and enforcement. Therefore the Commission rejects the suggestion that requiring a copy of a compact is wasteful.

Amendment issues

One commenter suggested amending § 522.3(b) by inserting "after adoption" following the word "days" to make the requirement consistent with subsection (a). The Commission agrees and therefore has inserted "after adoption" in the text of the regulation.

Another commenter suggested revising from 15 to 60 days the time limit for submission of an amendment that has been adopted by a tribe under § 522.3(b). The Commission disagrees. The present period of 15 days is sufficient to copy the amendment and mail it to the Commission.

Approval clarifications

The Commission corrected two cross references and clarified the applicability of the regulations to key employees and primary management officials in § 522.4. First, the Commission corrected the references in § 522.4(b)(1). The language of the regulation now reads: "The tribe shall have the sole proprietary interest in * * * gaming * * * unless it elects to allow individually owned gaming under either § 522.10 or § 522.11 of this part." Second, the language of § 522.4(b)(4) now reads: "All gaming related contracts * * * shall be specifically included within the scope of the audit conducted under § 522.4(b)(3) of this part." To clarify that the background investigations and licensing requirements of parts 556 and 558 apply only to key employees and primary management officials, the Commission inserted those terms in § 522.4(b)(5).

Sole proprietary interest

One commenter requested that the Commission define "sole proprietary interest" as it relates to gaming. The commenter wanted to know whether that term would exclude leases on equipment, collateral for loans, and tribal member stock ownership. In the view of the Commission, unless a tribe elects to license individual owners, the tribe must have "the sole proprietary interest and responsibility for the conduct of any gaming activity." Section 2710(b)(2)(A). An agreement whereby consideration is paid or payable to the gaming operation for the right to place gambling devices that are controlled by the vendor in such gaming operation is inconsistent with the requirement that a tribe have the sole proprietary interest. Regarding collateral for loans, a tribe may not grant a security interest in a gaming operation if such an interest would give a party other than the tribe the right to control gaming in the event of default by a tribe. Such a security interest would be inconsistent with the IGRA's requirement that a tribe have the "sole proprietary interest and responsibility for the conduct of any gaming activity." Similarly, because IGRA specifies that a tribe (not its members) must have the sole proprietary interest, stock ownership in a tribal gaming operation by individual tribal members would also be inconsistent with the IGRA. It is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances.

Charitable organizations

Two commenters objected to a reference to the Internal Revenue Service with respect to charitable organizations under § 522.4(b)(2)(iv). Under section 2710(b)(2)(B)(iv), gaming revenues may be donated to charitable organizations. The Commission had stated that charitable organizations are generally understood to be those approved by the I.R.S. under I.R.C. section 501(c)(3). The commenters stated that I.R.S. approval would not be an appropriate test for two reasons. First, tribes are not subject to Federal income tax. Second, within tribes there are clans, societies and other traditional organizations that customarily conduct charitable activities. The Commission agrees with the reasoning of the commenters. The Commission did not intend to prevent groups within tribes from receiving charitable donations so long as those groups are charitable as that term is legally understood. Black's Law Dictionary defines "charitable" as follows: "Having the character or purpose of a charity. The word 'charitable', in a legal sense includes every gift for a general public use, to be applied consistent with existing laws, for benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint." In the view of the Commission, donations to groups that come within this definition meet the requirement of the IGRA.

Submission completeness

One commenter suggested amending § 522.4 so that the 90 day approval review period would begin only after a Chairman's determination that a submission was complete. The Commission rejects that suggestion. Although the Commission plans to notify tribes of incomplete submissions, an ordinance would be deemed approved under section 2710(e) unless the Chairman acts within 90 days. With respect to existing ordinances and resolutions, § 523.3(b) requires the Chairman to notify a tribe in writing of specific areas of noncompliance. The Commission notes that it will review most ordinances under part 523 rather than part 522 because most tribes already have gaming ordinances.

Duplication of IGRA's language

One commenter suggested deleting as unnecessary subparagraphs (b)(2), (3), (4), (6) and (7) of § 522.4, stating that those requirements duplicate the IGRA. The Commission rejects that suggestion. Those subparagraphs are included to provide a complete reference, without having to refer to the IGRA.

Disapproval clarification issues

A commenter suggested clarifying that disapproval of an ordinance may be for reasons other than failing to submit information required § 522.2. The Commission agrees and therefore has clarified § 522.5 by inserting "or § 522.4(b)." The Commission added an additional sentence to clarify that the Commission will notify a tribe of its right to appeal a disapproval. The additional sentence reads: "The Chairman shall notify a tribe of its right to appeal under part 524."

Stay

Another commenter requested that the Chairman's disapproval under § 522.5 or § 522.7 be stayed pending the Commission's action on an appeal. The Commission agrees. The Commission intends to stay the effect of a disapproval. Therefore the Commission added to § 522.5 and § 522.7 the following sentence: "A disapproval shall be effective immediately unless appealed under part 524." The Chairman will refrain from taking an enforcement action pending an appeal.

Cure period

A commenter requested a "cure period," to be in effect after the Commission upholds a disapproval by the Chairman. The Commission disagrees. During an appeal a tribe may request such a cure period as part of any relief sought. The Commission will consider requests for a cure period on a case-by-case basis.

Automatic approval

Another commenter requested amending § 522.5 by adding, "otherwise the submitted ordinance will be automatically approved upon expiration of 90 days after submission for approval under § 522.2." The Commission rejects this suggestion as unnecessary in view of § 522.9. That section provides for substitute approval if the Chairman fails to approve or disapprove an ordinance.

Class III ordinance clarifications

To clarify appeal rights of a tribe upon disapproval of a class III ordinance, the

Commission inserted under § 522.7 "and notify a tribe of its right to appeal under part 524" after "resolution."

To clarify that it is upon the Chairman's approval that there will be publication in the **Federal Register** of a class III tribal gaming ordinance, the Commission replaced "Commission" with "Chairman" and replaced "its" with "the Chairman's."

Undue influence issues

One commenter questioned whether the approval process was a proper forum for considering any undue influence over a tribe in adopting its class III gaming ordinance under § 522.7(a)(2). In this commenter's view, the Commission should be concerned only with the particular provisions of a gaming ordinance. The Commission disagrees. Section 2710(d)(2)(B) directs the Chairman to disapprove a class III ordinance "if the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution * * *." Because IGRA directs the Chairman's attention to issues of undue influence in reviewing a class III ordinance, the Commission is not free to ignore those issues.

Other commenters questioned whether the Commission interpreted too broadly the class of people whose influence should be scrutinized. In these commenters' view, scrutiny for undue influence should be limited to persons found to pose a threat of criminal influence. The Commission thinks not. An exercise of undue influence by any person having a financial or management interest under 25 CFR 502.17 or 502.18 would constitute a per se threat to the public interest and the effective regulation and control of gaming. Additionally, restricting scrutiny to persons found to pose a threat of criminal influence would require there to be such finding before an exercise of undue influence could be deemed improper. In the Commission's view, undue influence by any person having a financial or management interest is improper and hence grounds for disapproving an ordinance. Therefore, the Commission rejects the suggestion.

Individually owned class III operations

To clarify the language in § 522.10(f) that requires "denial of a license for any person or entity that would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the surrounding state," the Commission added a second sentence that clarifies the extent to which state law standards apply. Looking to the Committee Report for guidance, the Commission found it in a discussion of the requirements for individually owned gaming. There, the Report states: "While a tribe should license such enterprises as part of its governmental function, the Committee has determined that State law (such as purpose, entity, pot limits, hours o(f) operation, etc.) should apply to such enterprises. These games are not to be confused with units of a tribe or tribal social or charitable organizations that operate gaming to support their charitable purposes, such games are not covered by this paragraph but rather will come under tribal gaming." S. Rep. No. 446, 100th Cong., 2d Sess 12 (1988).

One commenter suggested limiting authority to engage in class III gaming to Indian tribes under § 522.10. In this commenter's view, the language of section 2710(d)(3)(A), which limits compacting authority to Indian tribes, also limits class III gaming operations to tribes. The Commission disagrees, noting that (d)(2)(A) clearly contemplates non-tribal entities being authorized to engage in class III gaming. That provision states: "If any Indian tribe proposes to engage in, *or to authorize any person or entity to engage in*, a class III gaming activity * * *" (emphasis added). Because the Commission is not free to ignore the clear language of the IGRA, the Commission rejects the suggestion.

Another commenter suggested including a provision for the transfer of grandfathered gaming licenses under § 522.11. The Commission rejects that suggestion, noting the IGRA specifically prohibits such transfers. Section 2710(b)(4)(B)(ii) states: "The exemption from the application of this subsection (concerning individually owned gaming operations) provided under this subparagraph may not be transferred to any person or entity * * *."

Part 523—Review and Approval of Existing Ordinances or Resolutions

Clarification of § 523.1

To clarify that part 523 applies to ordinances in existence before the promulgation of this rulemaking, not ordinances that may have been disapproved under part 522, the text of § 523.1 now reads: "* * * and that has not been submitted to the Chairman."

Status of gaming activity pending review

One commenter suggested that part 523 should address the provision in section 2712(a) that states, "(a)ny activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section." The Commission agrees that an otherwise valid gaming activity remains valid until the ordinance is disapproved by the Chairman. Nothing in the Commission's regulations provides otherwise. Therefore the Commission rejects the suggestion as unnecessary.

Submission of financial information

To clarify that the Commission requires financial information for only the previous fiscal year under § 523.2(a)(2), the Commission changed the text of the regulation to indicate that it requires submission of financial statements for the previous fiscal year and the most recent audit report and management letter.

Deemed disapproval for failure to submit an ordinance

To clarify the status of an ordinance that a tribe failed to submit upon the request of the Chairman under § 523.2(a), the Commission added a new paragraph (b) providing that the Chairman will deem the ordinance or resolution disapproved and will notify such tribe of its appeal rights under part 524.

When a tribe disagrees with the Chairman's order to amend an ordinance

Two commenters suggested amending § 523.3 to include procedures that were mentioned in the preamble. There, the Commission had stated: "When a tribe and the Commission disagree about amending an ordinance, the Commission intends that a tribe and the Commission may jointly waive the 120-day period, in which case the Chairman would disapprove the ordinance or resolution, and the tribe could then proceed to appeal under part 524 * * *." 57 FR 30347. The Commission agrees and has therefore inserted in paragraph (d) after "section," "or earlier if the tribe notifies the Chairman that it intends not to comply(.)"

Part 524—Appeals

Appeals by a party other than a tribe

Some commenters stated that appeals should be limited to a tribe's appealing the Chairman's disapproval of an ordinance, resolution or amendment, stating that the validity of a tribal gaming ordinance or resolution is a matter of tribal sovereignty, subject only to the Chairman's review. In the view of these commenters, other interests have no standing to contest such proceeding. Under the Administrative Procedure Act, each agency may have its own rules regarding standing to participate in its administrative proceedings. An agency's standing rules may differ and may be narrower than a court's rules. However, a person who may not have standing under agency rules, but who would have standing under a court's rules, may challenge an agency action in Federal court. With the differing rules for standing in mind, the Commission revisited part 524. The regulation now provides that only a tribe may appeal a disapproval by the Chairman under § 524.1. Other persons may, however, request limited participation in such a proceeding under § 524.2. The Commission also notes that any person may contribute to the Chairman's deliberations in reviewing an ordinance by writing the Chairman.

Appeal deadlines

One commenter was concerned that an appeal deadline could run without a tribe's knowing that the Commission had taken an appealable action. The Commission notes that this could not happen under the language of the final regulation. The final regulation includes the following: "An appeal shall be filed with the Commission within 30 days after the Chairman serves his or her determination under part 519." In adding the preceding sentence, the Commission believes it has addressed the concern of the commenter.

Deletion of appeals for approvals

One commenter stated that appeals should be limited to disapprovals. The Commission agrees and has therefore revised the regulation to allow only for appeals in the case of disapprovals.

Part 556—Background Investigations for Primary Management Officials and Key Employees

Jurisdictional clarifications with respect to class III gaming

The Commission revisited the issue of jurisdiction with respect to class III gaming in response to commenters' and its own concerns. One commenter stated that it may be impossible for some tribes with compacts for class III gaming to comply with procedures that would have required disclosure to a tribe of the results of background investigations that were conducted by a state. The commenter was concerned that under the relevant compact, the state conducted the background investigation but did not disclose the reports to a tribe. Rather, under that compact, the state discussed the contents of a report with the tribal governing body. The Commission agrees that the proposed requirement would have presented jurisdictional problems and therefore changed the scopes of parts 556 and 558 as explained below. In the view of the Commission, if a tribe receives background investigation information under a compact that allocates responsibility to a state, such an arrangement is beyond the jurisdiction of the Commission.

Another commenter questioned whether procedures under a compact would have been considered as stringent as the procedures spelled out in parts 556 and 558. As discussed below, the Commission has changed the regulation so that certain requirements no longer apply where a tribal-state compact allocates responsibility to a state. Where a compact allocates responsibility to both a tribe and a state, however, the final regulation requires a tribe to forward an application and an investigative report to the Commission.

One commenter questioned whether requiring submission of investigative reports for class III employees was proper when, in the view of that commenter, class III gaming falls solely within a tribal-state compact. As explained below, the regulation requires investigative reports for class III gaming only where a compact allocates sole or joint jurisdiction to a tribe.

In revisiting the jurisdictional issues, the Commission reviewed the IGRA's provisions. The IGRA requires that class III gaming be authorized by an ordinance that meets the requirements for class II gaming and is approved by the Chairman. Section 2710(d)(1)(A). Additionally, class III gaming must be conducted under a tribal-state compact that is in effect. Section 2710(d)(1)(C). Under such a compact, however, a tribe may agree to state civil laws and regulations with respect to licensing, or to tribal laws, or to both state and tribal laws. Section 2710(d)(3)(C)(i).

To harmonize IGRA's apparently conflicting provisions, the Commission interprets the IGRA to grant jurisdiction to the Commission with respect to reviewing background investigations and licensing where a tribe has authority under a compact to license class III gaming. In the view of the Commission, Congress intended Commission oversight of class III licensing and background investigations where a compact allocates jurisdiction to a tribe for licensing. The Commission notes that licensing and background investigations (including Commission notification by a tribe of the results of a background investigation) are an integral part of the "adequate system" required under section 2710(b) for ordinance approval. Furthermore, nowhere does the IGRA exempt licensing for class III gaming from the requirements of section 2710(b), even where a compact may provide otherwise. As a practical matter, however, because the Commission lacks jurisdiction over states and therefore cannot oversee their activities with respect to background investigations and licensing for Indian gaming, the Commission has not included within the scope of either part 556 or 558 background investigations and licensing where a compact allocates those activities solely to a state. The Commission therefore conformed the texts of parts 556 and 558 to its views on jurisdiction, eliminating separate requirements for class III. The final regulations apply to all class II and to class III gaming where a tribe has sole or joint jurisdiction over background investigations and licensing.

Conditional or temporary employment and licenses pending background investigation

Some commenters requested provision for conditional or temporary employment and licenses due to the time it takes to complete criminal records checks or other delays. The Commission has addressed the need to hire an employee before being able to conduct a background investigation through the requirements of part 556 and § 558.3(b). Under those requirements, a tribe may employ a key employee or a primary management official for up to 90 days before either issuing a license or terminating employment as a key employee or primary management official. Therefore the Commission rejects this suggestion.

Effect of compact provisions on class II gaming

One commenter suggested that where a compact spelled out procedures for background investigations and licensing, that those procedures should be deemed sufficient for class II gaming. The Commission disagrees because the IGRA sets out requirements for class II gaming regardless of whether a compact is in effect for class III gaming. Furthermore, the IGRA requires that investigations and licensing for class III gaming comply with certain standards, as set out in the discussion under "Jurisdictional clarifications with respect to class III gaming." The Commission therefore rejects the suggestion.

Additional positions under "key employee" as that term is defined under 25 CFR 502.14

One commenter suggested amending the definition of key employee to include surveillance and investigative personnel. The Commission believes that background investigations and licensing of persons in positions listed in the existing definitions are adequate to protect the integrity of Indian gaming. Section 502.14 includes the Chief of Security, any person whose total cash compensation is in excess of $50,000 per year, or, if not otherwise included, the four most highly compensated persons in a gaming operation. Furthermore, the definition of a primary management official includes any person who has authority to hire and fire employees or to set up working policy for a gaming operation. As the Commission stated, however, in the preamble to its definitions regulations, "(a) tribe may add any other positions to its own definition." (57 FR 12388, April 9, 1992)

Confidentiality

One commenter questioned how it would be possible to maintain confidentiality under § 556.4(b) with respect to the identity of people interviewed in the course of background investigations. This commenter was concerned about disclosure to a tribe. The intent of requiring a promise of confidentiality is to maintain confidentiality with respect to the subject of the investigation and the public, not a tribal authority conducting such investigation. Disclosure to a tribal authority, the Commission, or its staff does not compromise with confidentiality.

Time limits with respect to gaming offenses

One commenter suggested deleting the time limit with respect to gaming offenses for misdemeanor convictions under § 556.4(a). The Commission rejected that suggestion as not necessary to protect the integrity of Indian gaming. The Commission notes, however, that a tribe may require any information beyond the time limits specified by the Commission in § 556.4(a). See § 556.4(a)(13).

Criminal charges and arrests

Some commenters suggested requiring information on arrests, or criminal charges in § 556.4(a), stating that as a result of plea bargains or use of an individual as an informant, that otherwise valid arrests are frequently not converted to convictions. The Commission agrees that where criminal charges are brought by a law enforcement authority such information should be available to a tribal gaming authority and has therefore added criminal charges to § 556.4(a)(10). With respect to arrests, however, unless an arrest results in a criminal charge, there may not be information that is sufficiently reliable to use in determining suitability for employment in Indian gaming. Therefore the Commission rejected the suggestion to require information concerning mere arrests.

Asset and liability disclosure

One commenter suggested requiring asset and liability disclosure under § 556.4(a), stating such information would allow the Commission to discover hidden ownership interests or the involvement of undesirable individuals who might influence the gaming operation. The Commission rejects that suggestion, noting that it already proposes to require such disclosure under its management contract regulations for persons having a direct or indirect financial interest in a management contract. (See proposed § 537.1(b)(1)(xi), 57 FR 37661, August 19, 1992.) In addition, § 556.4(a)(5) and (6) require disclosure of ownership interests in business relationships with Indian tribes and with the gaming industry. A tribe may, however, require such information for key employees or primary management officials under its tribal ordinance.

Catch all ("other information as required") requirement

One commenter suggested adding to § 556.4(a) a catch all requirement, stating that without such a requirement a tribe or the Commission may be precluded from obtaining information necessary to make a fair determination. The Commission rejects this suggestion, noting that it is a tribe, not the Commission, that determines suitability for employment in a gaming operation. Moreover, a tribe may require any other information that it deems relevant under § 556.4(a)(13).

Updating background investigations and investigative reports

One commenter suggested providing for the Commission to notify a tribe in those instances when the Commission already possesses an investigative report. This would signal that a tribe would only need to provide updated information. In the view of the Commission, it is important that a tribe have a complete record of a previous background investigation, not merely a summary investigative report. Therefore, although the Commission will provide a tribe an investigative report, a tribe may not rely solely on that report in making an eligibility determination under § 558.2. The Commission notes that in reviewing an application a tribe can determine if another tribe has previously employed the applicant. In such cases, a tribe may request investigative information from the other tribe. The Commission has clarified § 556.4(c) to provide that a tribe may request access to such material from the tribe that previously had conducted a background investigation.

Disposition of felony charges

One commenter suggested adding "if any" to § 556.4(a)(8) regarding the disposition of a felony charge, stating that there is no disposition in an on-going prosecution. The Commission agrees and therefore has inserted "if any" after "disposition".

Authority of the Commission to require an investigative report prior to a tribe's licensing a key employee or a primary management official

Some commenters questioned the authority of the Commission to require an investigative report prior to a tribe's licensing a key employee or a primary management official under § 556.5(b). The commenters read section 2710(c)(1) to give the Commission authority to review a licensing decision for 30 days after a tribe issues a license. The Commission disagrees, noting that § 2710(b)(2)(F)(ii)(III) requires, as a condition of approval of a tribal ordinance, that a tribe have "an adequate system which * * * includes * * * notification by the Indian tribe to the Commission of the results of such background check *before* the issuance of any * * * licenses." (emphasis added) Because the Commission is not free to ignore this requirement, it rejects the suggestion.

Part 558—Gaming Licenses for Key Employees and Primary Management Officials

Applicability to employees other than key employees and primary management officials

One commenter requested adding an explicit provision that would leave tribes to develop standards and procedures for employees other than key employees and primary management officials. The Commission rejects that suggestion because § 558.1(b) already makes it clear that the standards and procedures of part 558 apply only to key employees and primary management officials. However, because the Commission wished to alert tribes that a requirement for a certificate of self-regulation under section 2710(c)(3) is that a tribe "has * * * adopted and is implementing adequate systems for * * * investigation, licensing and monitoring of *all* employees of the gaming (operation)" (emphasis added), the Commission also stated that, "(a) tribe shall develop licensing procedures for all employees of a gaming operation * * *." Hence, the requirement in § 558.1(b) that a tribe develop licensing procedures for all employees.

Licensing persons other than key employees and primary management officials

The same commenter requested amending § 558.1 to state that a tribe may license persons having a direct or indirect financial interest in a management contract. A tribe is free to prescribe license requirements for whomever it wishes so long as it also licenses key employees and primary management officials. Thus a tribe may license persons having a direct or indirect financial interest in a management contract. Therefore the Commission rejects the suggestion as unnecessary.

Sixty-day time limit for submission of an investigative report under § 558.3(b)

Two commenters questioned whether 60 days is sufficient time for a tribe to conduct a background investigation and to submit a background investigation report. The Commission notes that with respect to existing employees, tribes have 120 days after being notified of any deficiencies in an ordinance under § 523.3(c) to bring the ordinance into compliance. During that time tribes may also conduct background investigations on existing key employees and primary management employees. In addition to the 120 days under § 523.3(c), under § 558.3(b) tribes have 60 days from the date of ordinance approval to conduct a background investigation and prepare an investigative report. For new operations, a tribe may begin background investigations before hiring and may complete background investigations before submitting an ordinance for approval. In light of the existing deadlines, the Commission did not change the 60-day requirement.

Clarification of when a hearing right vests under § 558.1(d)

To clarify that a hearing right vests only for an employee who has obtained a license after the Chairman has approved an ordinance under either part 522 or 523, the Commission inserted "granted" after "license".

Automatic disqualification for applicants who are convicted of felonies or misdemeanors that are crimes of moral turpitude

One commenter suggested that applicants who are convicted of felonies or misdemeanors that are crimes of moral turpitude should automatically be disqualified from holding a key employee or primary management official position in Indian gaming under § 558.2. The Commission notes that the IGRA leaves the actual standards for employment to tribes under section 2710(b)(2)(F)(ii)(II). That provision requires a tribe to have "an adequate system which * * * includes * * * a standard whereby any person whose prior activities * * * pose a threat to * * * the effective regulation of gaming * * * shall not be eligible for employment." Thus the IGRA dictates the result, leaving it to tribes to determine how best to achieve that result. Therefore a tribe could adopt a standard of automatic disqualification but is not required to do so. Even without automatic disqualifications, in the view of the Commission, there are safeguards adequate to protect the integrity of Indian gaming. Such safeguards include requiring the Commission to review the application and investigative report of each key employee and primary management official and consult with appropriate law enforcement officials. Furthermore, upon notification by the Commission of reliable information indicating unsuitability for employment in Indian gaming, a tribe is required to suspend the license of any key employee or primary management official pending a hearing. In light of the limiting language of the IGRA and the other safeguards, the Commission rejects the suggestion.

Threat to the public interest

One commenter requested clarification of the IGRA's language concerning ineligibility for employment where such employment would be a "threat to the public interest" under § 558.2. In the view of the commenter, such language is vague and therefore subject to litigation. Attempting to apply that language without specific facts, however, would be futile and the Commission therefore rejects the suggestion. The Commission will, however, provide guidance to a tribe in specific situations.

Clarification with respect to "prior activities, criminal record, if any, or reputation, habits and associations"

Two commenters pointed out that the Commission had omitted the above language from § 558.2. The Commission therefore amended the text of the regulation to include that language.

Denial of a license for a false statement or omission

Two commenters suggested amending § 558.2 to provide for license denials where an applicant provides a false statement or omits information from an application. The Commission considered but rejected requiring a tribe to deny a license in such circumstances. In the view of the Commission, however, lying on an application by itself may be grounds for disqualification. When a lie is also material, the person who lies should most likely not be hired, or if already hired, should be fired, absent very compelling reasons to the contrary. The Commission notes that it intends to notify tribes to suspend licenses under § 558.5 when it uncovers information that indicates a material lie, misstatement or omission on an application. In the Commission's view, materially false or misleading information is information that if correct, or supplied, is important in determining eligibility for employment as a key employee or primary management official in Indian gaming.

The Commission notes that a U.S. Attorney may prosecute an individual omitting material information or supplying false or misleading material information under 18 U.S.C. 1001. See § 556.3. Title 18 U.S.C. 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The Commission also notes that under 25 U.S.C. 2716(b), it must notify appropriate law enforcement officials when it has information that indicates a violation of Federal, State or Tribal statutes, or resolutions.

Denial of a license for failure to meet any additional criteria imposed by a tribe

One commenter suggested amending § 558.2 to provide for license denials to meet any additional criteria imposed by a tribe. The Commission notes that a tribe may add criteria to its eligibility determination so long as those criteria are not less stringent than the criteria in the IGRA. Therefore the Commission rejects the suggestion as unnecessary.

Hiring a person deemed ineligible under § 558.2

One commenter suggested amending § 558.2 to provide that any person ineligible for employment as a key employee or primary management official be automatically disqualified for any position or function related to the gaming operation. The Commission notes that key employees and primary management officials are within the jurisdiction of the Commission under the IGRA; other positions are not. Therefore the Commission may not prohibit a tribe from hiring a person deemed ineligible in another position, providing that person does not perform any of the functions of a key employee or a primary management official. Hence the Commission rejects the suggestion.

Adequacy of Commission's 30-day review period

One commenter questioned whether the Commission is prepared to conduct adequate background investigations within the 30-day period under § 558.3(c). The Commission notes that it is not responsible for conducting background investigations, only reviewing them. Furthermore, the Commission is limited by the IGRA, which specifies a 30-day review period in section 2710(c)(1). The Commission is not, however, limited by any time period if it later receives reliable information indicating that an employee is not eligible for employment under § 558.2. In such case, the Commission may notify a tribe under § 558.5. Failure to suspend a license would constitute possible grounds for an enforcement action under section 2713. For the above reasons, the Commission rejects the suggestion.

Conducting background investigations before hiring employees

One commenter suggested that if § 558.3 required conducting a background investigation before hiring, a significant number of suspension hearings under § 558.5(c) could be avoided. However, the right to a suspension hearing attaches only after a tribe grants a license, not after a tribe hires an employee. Therefore conducting a background investigation before hiring an applicant would not reduce the number of suspension hearings. For this reason, the Commission rejects the suggestion.

Who may appeal an objection to a tribe's granting a license

One commenter suggested that both a tribe and an applicant should have standing to appeal a Commission's objection to a tribe's granting a license under § 558.4(b). The Commission clarified its role in objecting to a tribe's granting a license. The text of the regulation now reads that the Commission shall notify a tribe of its objection and the tribe shall reconsider the matter, taking into account the Commission's reasons. The tribe retains discretion to issue a license whether or not the Commission objects. Because it is the Commission that notifies a tribe of its objection, such a decision is a final decision and therefore may not be administratively appealed. Consequently, the Commission rejects the suggestion.

Another commenter suggested amending § 558.5(b) to allow continuation of employment as a key employee or primary management official pending an appeal. As pointed out in the preceding paragraph, there would be no Commission action to appeal. In the view of the Commission, it is not within a tribe's discretion to allow continuation of employment pending a revocation hearing. The IGRA states that a tribe "shall suspend such license," leaving no apparent room for continuing employment. Section 2710(c)(2). Furthermore, it is unlikely that a tribe would want to allow continuation of employment in such a situation because it is the tribe that makes the determination to suspend a license. For these reasons the Commission rejects the suggestion.

Regulatory Matters

Executive Order 12291 and the Regulatory Flexibility Act

The Commission has determined that this document is not a major rule under Executive Order 12291. Under the Executive Order, a rule is a major rule if: (1) Its annual effect on the economy will be $100 million or more; (2) it will result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions; or (3) there will be significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign based enterprises in domestic or export markets. If a rule is major, the agency must conduct a regulatory impact analysis. The Commission believes that the rule will not have any significant effect on the economy or result in major increases in costs or prices for consumers, individual industries, Federal, state, or local governments, agencies, or geographical regions. The Commission also believes that the rule will not have any adverse effects on competition, employment, investment, productivity, innovation, or the export/import market. No commenter supplied data that contradicted the Commission's tentative conclusion under E. O. 12291.

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. The Regulatory Flexibility Act requires agencies to determine whether a rule will have a significant economic impact on a substantial number of small entities. If so, an agency must prepare a regulatory flexibility analysis that explores less burdensome alternatives. If not, an agency must certify that the rule will not have such an impact. No commenter supplied data that contradicted the Commission's tentative conclusion under the Regulatory Flexibility Act.

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for approval as required by 44 U.S.C. 3501 *et seq.* and assigned clearance number 3141–0003, with an expiration date of October 31, 1995.

National Environmental Policy Act

The Commission has determined that this rulemaking 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.

Executive Order 12278

The Chairman of the National Indian Gaming Commission has certified to the Office of Management and Budget that this final rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order No. 12778, "Civil Justice Reform," 56 FR 55195, October 25, 1991.

Anthony J. Hope,

Chairman, National Indian Gaming Commission.

List of Subjects in 25 CFR Parts 501, 519, 522, 523, 524, 556, 558

Gaming, Indian lands.

Title 25, Chapter III, of the Code of Federal Regulations is amended by adding parts 501, 519, 522, 523, 524, and 556 to read as follows:

PART 501—PURPOSE AND SCOPE OF THIS CHAPTER

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

§ 501.1 Purpose.

This chapter implements the Indian Gaming Regulatory Act (Pub. L. 100–497, 102 Stat. 2467).

§ 501.2 Scope.

(a) Tribes and other operators of class II and class III gaming operations on Indian lands shall conduct gaming operations according to the requirements of the Indian Gaming Regulatory Act, the regulations of this chapter, tribal law and, where applicable, the requirements of a compact or procedures prescribed by the Secretary under 25 U.S.C. 2710(d).

(b) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of the Indian Gaming Regulatory Act or this Chapter.

(c) Class II gaming on Indian lands shall continue to be within the jurisdiction of an Indian tribe, but shall be subject to the provisions of the Indian Gaming Regulatory Act and this Chapter.

(d) Nothing in the Indian Gaming Regulatory Act or this Chapter shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with a State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by a Tribal-State compact that is entered into by an Indian tribe under the Indian Gaming Regulatory Act and that is in effect.

PART 519—SERVICE

Authority: 25 U.S.C. 2706(b)(10).

§ 519.1 Designation of an agent by a tribe.

By written notification to the Commission, a tribe shall designate an agent for service of any official determination, order, or notice of violation.

§ 519.2 Designation of an agent by a management contractor or a tribal operator.

By written notification to the Commission, a management contractor or a tribal operator shall designate an agent for service of any official determination, order, or notice of violation.

§ 519.3 Methods of service.

(a) The Chairman shall serve any official determination, order, or notice of violation by:

(1) Delivering a copy to a designated agent;

(2) Delivering a copy to the person who is the subject of the official determination, order, or notice of violation;

(3) Delivering a copy to the individual who, after reasonable inquiry, appears to be in charge of the gaming operation that is the subject of the official determination, order, or notice of violation;

(4) Mailing to the person who is the subject of the official determination, order, or notice of violation or to his or her designated agent at the last known address. Service by mail is complete upon mailing; or

(5) Transmitting a facsimile to the person who is the subject of the official determination, order, or notice of violation or to his or her designated agent at the last known facsimile number. Service by facsimile is complete upon transmission.

(b) Delivery of a copy means: Handing it to the person or designated agent (or attorney for either); leaving a copy at the person's, agent's or attorney's office with a clerk or other person in charge thereof; if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(c) Service shall not be deemed incomplete because of refusal to accept.

§ 519.4 Copy of any official determination, order, or notice of violation.

The Commission shall transmit a copy of any official determination, order, or notice of violation to the tribal chairman, the designated tribal agent under § 519.1, and to the relevant tribal gaming authority. The Commission shall transmit such copy as expeditiously as possible. Service under § 519.3 shall not depend on a copy being sent to the appropriate tribal chairman, the designated tribal agent or to the relevant tribal gaming authority.

PART 522—SUBMISSION OF GAMING ORDINANCE OR RESOLUTION

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

§ 522.1 Scope of this part 522.

This part applies to any gaming ordinance or resolution adopted by a tribe after February 22, 1993. Part 523 of this chapter applies to all existing gaming ordinances or resolutions.

§ 522.2 Submission requirements.

A tribe shall submit to the Chairman all of the following information with a request for approval of a class II or class III ordinance or resolution:

(a) One copy on 8½" x 11" paper of an ordinance or resolution certified as authentic by an authorized tribal official and that meets the approval requirements in § 522.4(b) or 522.6 of this part;

(b) A description of procedures to conduct or cause to be conducted background investigations on key employees and primary management officials and to ensure that key employees and primary management officials are notified of their rights under the Privacy Act as specified in § 556.2 of this chapter;

(c) A description of procedures to issue tribal licenses to primary management officials and key employees;

(d) Copies of all tribal gaming regulations;

(e) When an ordinance or resolution concerns class III gaming, a copy of the tribal-state compact or procedures as prescribed by the Secretary;

(f) A description of procedures for resolving disputes between the gaming public and the tribe or the management contractor;

(g) Designation of an agent for service under § 519.1 of this chapter; and

(h) Identification of a law enforcement agency that will take fingerprints and a description of procedures for conducting a criminal history check by a law enforcement agency. Such a criminal history check shall include a check through the Federal Bureau of Investigation National Criminal Information Center.

§ 522.3 Amendment.

(a) Within 15 days after adoption, a tribe shall submit for the Chairman's approval any amendment to an ordinance or resolution.

(b) A tribe shall submit for the Chairman's approval any amendment to the submissions made under §§ 522.2(b) through (h) of this part within 15 days after adoption of such amendment.

§ 522.4 Approval requirements for class II ordinances.

No later than 90 days after the submission to the Chairman under § 522.2 of this part, the Chairman shall approve the class II ordinance or resolution if the Chairman finds that—

(a) A tribe meets the submission requirements contained in § 522.2 of this part; and

(b) The class II ordinance or resolution provides that—

(1) The tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation unless it elects to allow individually owned gaming under either § 522.10 or § 522.11 of this part;

(2) A tribe shall use net revenues from any tribal gaming or from any individually owned games only for one or more of the following purposes:

(i) To fund tribal government operations or programs;

(ii) To provide for the general welfare of the tribe and its members (if a tribe elects to make per capita distributions, the plan must be approved by the Secretary of the Interior under 25 U.S.C. 2710(b)(3));

(iii) To promote tribal economic development;

(iv) To donate to charitable organizations; or

(v) To help fund operations of local government agencies;

(3) A tribe shall cause to be conducted independent audits of gaming operations annually and shall submit the results of those audits to the Commission;

(4) All gaming related contracts that result in purchases of supplies, services, or concessions for more than $25,000 in any year (except contracts for professional legal or accounting services) shall be specifically included within the scope of the audit conducted under paragraph (b)(3) of this section;

(5) A tribe shall perform background investigations and issue licenses for key employees and primary management officials according to requirements that are at least as stringent as those in parts 556 and 558 of this chapter;

(6) A tribe shall issue a separate license to each place, facility, or location on Indian lands where a tribe elects to allow class II gaming; and

(7) A tribe shall construct, maintain and operate a gaming facility in a manner that adequately protects the environment and the public health and safety.

§ 522.5 Disapproval of a class II ordinance.

No later than 90 days after a tribe submits an ordinance for approval under § 522.2 of this part, the Chairman may disapprove an ordinance if he or she determines that a tribe failed to comply with the requirements of § 522.2 or § 522.4(b) of this part. The Chairman shall notify a tribe of its right to appeal under part 524 of this chapter. A disapproval shall be effective immediately unless appealed under part 524 of this chapter.

§ 522.6 Approval requirements for class III ordinances.

No later than 90 days after the submission to the Chairman under § 522.2 of this part, the Chairman shall approve the class III ordinance or resolution if—

(a) A tribe follows the submission requirements contained in § 522.2 of this part;

(b) The ordinance or resolution meets the requirements contained in § 522.4(b) (2), (3), (4), (5), (6), and (7) of this part; and

(c) The tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation unless it elects to allow individually owned gaming under § 522.10 of this part.

§ 522.7 Disapproval of a class III ordinance.

(a) Notwithstanding compliance with the requirements of § 522.6 of this part and no later than 90 days after a submission under § 522.2 of this part, the Chairman shall disapprove an ordinance or resolution and notify a tribe of its right of appeal under part 524 of this chapter if the Chairman determines that—

(1) A tribal governing body did not adopt the ordinance or resolution in compliance with the governing documents of a tribe; or

(2) A tribal governing body was significantly and unduly influenced in the adoption of the ordinance or resolution by a person having a direct or indirect financial interest in a management contract, a person having management responsibility for a management contract, or their agents.

(b) A disapproval shall be effective immediately unless appealed under part 524 of this chapter.

§ 522.8 Publication of class III ordinance and approval.

The Chairman shall publish a class III tribal gaming ordinance or resolution in the **Federal Register** along with the Chairman's approval thereof.

§ 522.9 Substitute approval.

If the Chairman fails to approve or disapprove an ordinance or resolution submitted under § 522.2 of this part within 90 days after the date of submission to the Chairman, a tribal ordinance or resolution shall be considered to have been approved by the Chairman but only to the extent that such ordinance or resolution is consistent with the provisions of the Act and this chapter.

§ 522.10 Individually owned class II and class III gaming operations other than those operating on September 1, 1986.

For licensing of individually owned gaming operations other than those operating on September 1, 1986 (addressed under § 522.11 of this part), a tribal ordinance shall require:

(a) That the gaming operation be licensed and regulated under an ordinance or resolution approved by the Chairman;

(b) That income to the tribe from an individually owned gaming operation be used only for the purposes listed in § 522.4(b)(2) of this part;

(c) That not less than 60 percent of the net revenues be income to the Tribe;

(d) That the owner pay an assessment to the Commission under § 514.1 of this chapter;

(e) Licensing standards that are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the surrounding State; and

(f) Denial of a license for any person or entity that would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the surrounding State. State law standards shall apply with respect to purpose, entity, pot limits and hours of operation.

§ 522.11 Individually owned class II gaming operations operating on September 1, 1986.

For licensing of individually owned gaming operations operating on September 1, 1986, under § 502.3(e) of this chapter, a tribal ordinance shall contain the same requirements as those in § 522.10(a)–(d) of this part.

§ 522.12 Revocation of class III gaming.

A governing body of a tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorizes class III gaming.

(a) A tribe shall submit to the Chairman on 8½" x 11" paper one copy of any revocation ordinance or resolution certified as authentic by an authorized tribal official.

(b) The Chairman shall publish such ordinance or resolution in the **Federal Register** and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(c) Notwithstanding any other provision of this section, any person or entity operating a class III gaming operation on the date of publication in the **Federal Register** under paragraph (b) of this section may, during a one-year period beginning on the date of publication, continue to operate such operation in conformance with a tribal-state compact.

(d) A revocation shall not affect—

(1) Any civil action that arises during the one-year period following publication of the revocation; or

(2) Any crime that is committed during the one-year period following publication of the revocation.

PART 523—REVIEW AND APPROVAL OF EXISTING ORDINANCES OR RESOLUTIONS

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

§ 523.1 Scope of this part 523.

This part applies to a class II or a class III gaming ordinance or resolution enacted by a tribe prior to February 22, 1993 and that has not been submitted to the Chairman.

§ 523.2 Submission requirements.

(a) Within 60 days after a request by the Chairman, a tribe shall:

(1) Submit for review and approval all items required under § 522.2 of this chapter; and

(2) For each gaming operation submit the financial statements for the previous fiscal year and the most recent audit report and management letter.

(b) If a tribe fails to submit all items under § 522.2 of this chapter within 60 days, the Chairman shall deem the ordinance or resolution disapproved and shall notify the tribe of its right to appeal under part 524.

§ 523.3 Review of an ordinance or resolution.

Within 90 days after receipt of a submission under § 523.2 of this part, the Chairman shall subject the ordinance or resolution to the standards in part 522 of this chapter.

(a) For class II and class III gaming, if the Chairman determines that an ordinance or resolution submitted under this part meets the approval and submission requirements of part 522 of this chapter and the Chairman finds the annual financial statements are included in the submission, the Chairman shall approve the ordinance or resolution.

(b) If an ordinance or resolution fails to meet the requirements for review under part 522 of this chapter or if a tribe fails to submit the annual financial statement, the Chairman shall notify a tribe in writing of the specific areas of noncompliance.

(c) The Chairman shall allow a tribe 120 days from receipt of such notice to bring the ordinance or resolution into compliance with the requirements of part 522 of this chapter or to submit an annual financial statement, or both.

(d) At the end of the 120-day period provided under paragraph (c) of this section, or earlier if the tribe notifies the Chairman that it intends not to comply, the Chairman shall disapprove any ordinance or resolution if a tribe fails to amend according to the notification made under paragraph (b) of this section.

§ 523.4 Review of an amendment.

Within 90 days after receipt of an amendment, the Chairman shall subject the amendment to the standards in part 522 of this chapter.

(a) If the Chairman determines that an amendment meets the approval and submission requirements of part 522 of this chapter, the Chairman will approve the amendment.

(b) If an amendment fails to meet the requirements for review under part 522 of this chapter, the Chairman shall notify the tribe in writing of the specific areas of noncompliance.

(c) If the Chairman fails to disapprove a submission under paragraph (a) or (b) of this section within 90 days after the date of submission to the Chairman, a tribal amendment shall be considered to have been approved by the Chairman but only to the extent that such amendment is consistent with the provisions of the Act and this chapter.

PART 524—APPEALS

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

§ 524.1 Appeal by a tribe.

A tribe may appeal disapproval of a gaming ordinance, resolution or amendment under part 522 or 523 of this chapter. An appeal shall be filed with the Commission within 30 days after the Chairman serves his or her determination under part 519 of this chapter. Such an appeal shall state succinctly why the tribe believes the Chairman's determination to be erroneous, and shall include supporting documentation, if any. Failure to file an appeal within the time provided by this section shall result in a waiver of the opportunity for an appeal.

§ 524.2 Limited participation by an entity other than a tribe.

(a) An entity other than a tribe may request to participate in an appeal of a disapproval under part 522 or part 523 of this chapter by filing a written submission. Such written submission shall:

(1) State the property, financial, or other interest of the party in the appeal; and

(2) The reasons why the action of the Chairman in disapproving an ordinance, resolution or amendment may be in error or the reasons why the Chairman's disapproval should be upheld by the Commission. The reasons shall address the approval requirements under §§ 522.4, 522.5, 522.6, 522.7, 523.2 of this chapter.

(b) The Commission shall forward a copy of a request under paragraph (a) of this section to the party of record under § 524.1 of this part.

(c) The Commission shall review a request under this section and timely notify the requester of its determination. Such notification shall supply the reasons for the determination. The Commission shall also notify the party of record on appeal under § 524.1 of its determination.

(d) The Commission shall limit the extent of participation by an entity other than a tribe to one written submission as described under paragraph (a) of this section, unless the Commission determines further participation would substantially contribute to the record.

§ 524.3 Decisions on appeals.

(a) Within 90 days after it receives the appeal, the Commission shall render its decision on the appeal.

(b) The Commission shall notify the party of record under § 524.1 of this part and any limited participant under § 524.2 of this part of its final decision and the reasons supporting it.

PART 556—BACKGROUND INVESTIGATIONS FOR PRIMARY MANAGEMENT OFFICIALS AND KEY EMPLOYEES

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

§ 556.1 Scope of this part 556.

Unless a tribal-state compact allocates sole jurisdiction to an entity other than a tribe with respect to background investigations, the requirements of this part apply to all class II and class III gaming.

§ 556.2 Privacy notice.

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

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

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

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

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

§ 556.3 Notice regarding false statements.

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

> A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment (U.S. Code, title 18, section 1001)

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

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

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

§ 556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of a gaming operation.

(a) A tribe shall request from each primary management official and from each key employee all of the following information:

(1) Full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);

(2) Currently and for the previous 5 years: business and employment positions held, ownership interests in those businesses, business and residence addresses, and drivers license numbers;

(3) The names and current addresses of at least three personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (a)(2) of this section;

(4) Current business and residence telephone numbers;

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

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

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

(8) For each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition if any;

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

(10) For each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (a)(8) or (a)(9) of this section, the criminal charge, the name and address of the court involved and the date and disposition;

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

(12) A photograph;

(13) Any other information a tribe deems relevant; and

(14) Fingerprints consistent with procedures adopted by a tribe according to § 522.2(h) of this chapter.

(b) A tribe shall conduct an investigation sufficient to make a determination under § 558.2 of this chapter. In conducting a background investigation, a tribe or its agents shall promise to keep confidential the identity of each person interviewed in the course of the investigation.

(c) If the Commission has received an investigative report concerning an individual who another tribe wishes to employ as a key employee or primary management official and if the second tribe has access to the investigative materials held by the first tribe, the second tribe may update the investigation and update the investigative report under § 556.5(b) of this part.

§ 556.5 Report to Commission.

(a) When a tribe employs a primary management official or a key employee, the tribe shall forward to the Commission a completed application containing the information listed under § 556.4(a)(1)–(13) of this part.

(b) Before issuing a license to a primary management official or to a key employee, a tribe shall forward to the Commission an investigative report on each background investigation. An investigative report shall include all of the following:

(1) Steps taken in conducting a background investigation;

(2) Results obtained;

(3) Conclusions reached; and

(4) The bases for those conclusions.

(c) When a tribe forwards its report to the Commission, it shall include a copy of the eligibility determination made under § 558.2 of this chapter.

(d) If a tribe does not license an applicant—

(1) The tribe shall notify the Commission; and

(2) May forward copies of its eligibility determination under § 558.2 and investigative report (if any) under § 556.5(b) to the Commission for inclusion in the Indian Gaming Individuals Record System.

PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

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

§ 558.1 Scope of this part 558.

Unless a tribal-state compact allocates responsibility to an entity other than a tribe:

(a) The licensing authority for class II or class III gaming is a tribal authority.

(b) A tribe shall develop licensing procedures for all employees of a gaming operation. The procedures and standards of part 556 of this chapter and the procedures and standards of this part apply only to primary management officials and key employees.

(c) For primary management officials or key employees, a tribe shall retain applications for employment and reports (if any) of background investigations for inspection by the Chairman or his or her designee for no less than three (3) years from the date of termination of employment.

(d) A right to a hearing under § 558.5 of this part shall vest only upon receipt of a license granted under an ordinance approved by the Chairman.

§ 558.2 Eligibility determination for employment in a gaming operation.

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

(b) A gaming operation shall not employ in a key employee or primary management official position a person who has supplied materially false or misleading information or who has omitted material information with respedct to the required information under § 556.4(a) of this chapter.

§ 558.3 Procedures for forwarding applications and reports for key employees and primary management officials to the Commission.

(a) When a key employee or a primary management official begins work at a gaming operation, a tribe shall:

(1) Forward to the Commission a completed application for employment that contains the notices and information listed in §§ 556.2, 556.3 and 556.4 of this chapter; and

(2) Conduct a background investigation under part 556 of this chapter to determine the eligibility of the key employee or primary management official for continued employment in a gaming operation.

(b) Upon completion of a background investigation and a determination of eligibility for employment in a gaming operation under paragraph (a)(2) of this section, a tribe shall forward a report under § 556.5(b) of this chapter to the Commission within 60 days after an employee begins work or within 60 days of the Chairman's approval of an ordinance under part 523. A gaming operation shall not employ a key employee or primary management official who does not have a license after 90 days.

(c) During a 30-day period beginning when the Commission receives a report submitted under paragraph (b) of this section, the Chairman may request additional information from a tribe concerning a key employee or a primary management official who is the subject of a report. Such a request shall suspend the 30-day period until the Chairman receives the additional information.

§ 558.4 Granting a gaming license.

(a) If, within the 30-day period described in § 558.3(c) of this part, the Commission notifies a tribe that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe may go forward and issue a license to such applicant.

(b) If, within the 30-day period described in § 558.3(c) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.

§ 558.5 License suspension.

(a) If, after the issuance of a gaming license, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for employment under § 558.2 of this part, the Commission shall notify the tribe that issued a gaming license.

(b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall suspend such license and shall notify in writing the licensee of the suspension and the proposed revocation.

(c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision.

[FR Doc. 93-1062 Filed 1-21-93; 8:45 am]
BILLING CODE 7565-01-M

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 515

RIN 3141-AA01

Privacy Act Procedures

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (NIGC, or the Commission) is establishing this rule in chapter III of title 25 of the Code of Federal Regulations (parts 500–599). This rule describes the procedures and policies adopted by the Commission pursuant to the Privacy Act of 1974, 5 U.S.C. 552a. Under the Act, Federal agencies must publish, in the **Federal Register**, notice of any systems of records that they intend to establish. Agencies must also

publish procedures regarding the collection, maintenance, use, and dissemination of certain records within those systems. The Commission published notice of the creation of the Indian Gaming Individuals Records System in the **Federal Register**. The regulations established here provide procedures regarding the maintenance, use, and dissemination of records complied in that system and in any other records systems created by the Commission.

EFFECTIVE DATE: February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Mary Jane Markley, (202) 632-7032 (not a toll free number).

SUPPLEMENTARY INFORMATION: Congress enacted the Privacy Act of 1974 as a means of regulating the collection, maintenance, use and dissemination of personal information gathered by Federal Government agencies. The purpose of the Act is to balance the need of agencies to maintain information about individuals for various purposes, against the individual right to be protected against unwarranted invasions of privacy. The Act restricts the disclosure of certain personal information, while allowing individuals, on whom records have been compiled, greater access to and the right to amend those records. In effect, the Act establishes a code of fair information practices with which agencies must comply.

Tribal Consultation

One commenter questioned whether a tribe would be consulted and its interests in confidential and privileged information protected under the Commission's Privacy Act rule. The Privacy Act protects records concerning individuals. Under the Act, the Federal Government may not disclose records concerning an individual to anyone except that individual, unless that individual has consented to a "routine use" disclosure. An individual consents to such disclosure pursuant to a Privacy Act Notice such as the one in 25 CFR 556.1.

The Freedom of Information Act directs the Federal Government to disclose all records except those falling under an exemption. Section 2716(a) of the IGRA specifically mentions the FOIA. Section 2716(a) directs the Commission to preserve confidential information under the FOIA. In the view of the Commission, section 2716(a) does not, however, direct the Commission with respect to the Privacy Act.

Although both acts govern how the government handles information, the purposes of the two acts are quite different. The Privacy Act seeks to protect information that concerns individuals, allowing disclosure by the Federal Government only for purposes listed in a Privacy Act Notice (see 25 CFR 556.1). The Privacy Act rule (25 CFR part 515) and Publication of System of Records Notice (57 FR 30358-30359) tell an individual how to request to see records concerning himself or herself and how to request amendments to those records, should the individual believe the records contain errors. The Privacy Act does not provide for consultation with third parties before allowing an individual to see records concerning himself or herself. The Commission does not contemplate its records containing investigative materials such as transcripts of interviews in connection with background investigations of key employees or primary management officials; such records would be retained by a tribe and would therefore be subject to tribal procedures for protecting such material.

Access To Records by Criminal Justice Agencies

Another commenter requested that the rule contain procedures for access by criminal justice agencies that may be conducting background checks on prospective primary management officials and key employees. Because the Privacy Act Notice (25 CFR 556.1) provides for such disclosure, the Commission may disclose records to a criminal justice agency that is conducting a background check on a prospective primary management official or key employee.

Access To Records by Tribes

The same commenter requested that the rule provide for access to records by tribes. The Privacy Act Notice (25 CFR 556.1) provides for disclosure of records to "appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies" in connection with the hiring of an employee. Thus the Commission may disclose records to a tribe in connection with the hiring or firing of a primary management official or key employee.

Regulatory Matters

Executive Order 12291 and the Regulatory Flexibility Act

The Commission has determined that this document is not a major rule under Executive Order 12291. The rule will not have any significant effects on the economy or result in major increases in costs or prices for consumers, individual industries, Federal, State, or local governments, agencies or geographical regions. The rule will not have any adverse effects on competition, employment, investment, productivity, innovation, or the export/import market.

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.

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for approval as required by 44 U.S.C. 3501 *et seq.* and assigned clearance number 3141-0002, with an expiration date of October 31, 1995.

National Environmental Policy Act

The Commission has determined that this rulemaking 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.

Executive Order 12778

The Chairman of the NIGC has certified to OMB that this rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778, "Civil Justice Reform," 56 FR 55195, October 25, 1991.

Anthony J. Hope,

Chairman, National Indian Gaming Commission.

List of Subjects in 25 CFR Part 515:

Gaming, Indian lands, Privacy Act.

Title 25, of chapter III of the Code of Federal Regulations is amended by adding part 515 to read as follows:

PART 515—PRIVACY ACT PROCEDURES

Sec.

Authority: 5 U.S.C. 552a.

§ 515.1 Purpose and scope.

(a) The purpose of this part is to inform the public of records maintained by the Commission about identifiable individuals and to inform those individuals how they may gain access to and amend records concerning themselves.

(b) This part carries out the requirements of the Privacy Act of 1974 (Pub. L. 93–579) codified at 5 U.S.C. 552a.

(c) The regulation applies only to records disclosed or requested under the Privacy Act of 1974, and not to requests for information made pursuant to 5 U.S.C. 552, the Freedom of Information Act.

§ 515.2 Definitions.

As defined in the Privacy Act of 1974 and for the purposes of this part, unless otherwise required by the context, the following terms shall have these meanings:

(a) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) *Maintain* means maintain, collect, use, or disseminate.

(c) *Record* means any item, collection, or grouping of information about an individual that is maintained by the Commission, including education, financial transactions, medical history, and criminal or employment history, and that contains the individual's name, or the identifying number, symbol, or other identifier assigned to the individual, such as social security number, finger or voice print, or a photograph.

(d) *System of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifier assigned to the individual.

(e) *Routine use* means, with respect to the disclosure of a record, the use of such record for a purpose that is compatible with the purpose for which it was collected.

§ 515.3 Identification of individuals making requests.

(a) Any individual may request that the Commission inform him or her whether a particular record system named by the individual contains a record pertaining to him or her and the contents of such record. Such requests shall conform to the requirements of § 515.4 of this part. The request may be made in person or in writing at the NIGC, suite 250, 1850 M Street, NW., Washington, DC 20036–5803 during the hours of 9 a.m. to 12 noon and 2 p.m. to 5 p.m. Monday through Friday.

(b)(1) Requests made in writing shall include a statement, signed by the individual and either notarized or witnessed by two persons (including witnesses' addresses). If the individual appears before a notary, the individual shall submit adequate proof of identity in the form of a driver's license, birth certificate, passport, or other identification acceptable to the notary. If the statement is witnessed, it shall include a statement above the witnesses' signatures that they personally know the individual or that the individual has submitted proof of his or her identity to their satisfaction. In any case in which, because of the extreme sensitivity of the record sought to be seen or copied, the Commission determines that the identification is not adequate, it may request the individual to submit additional proof of identity.

(2) If the request is made in person, the requester shall submit proof of identity similar to that described in paragraph (b)(1) of this section, and that is acceptable to the Commission. The individual may have a person of his or her own choosing accompany him or her when the record is disclosed.

(c) Requests made by an agent, parent, or guardian shall be in accordance with the procedures described in paragraph (b) of this section.

§ 515.4 Procedures for requests and disclosures.

(a) Requests for a determination under § 515.3(a) of this part shall be acknowledged by the Commission within ten (10) days (excluding Saturdays, Sundays and Federal holidays) after the date on which the Commission receives the request. If the Commission is unable to locate the information requested, it shall so notify the individual within ten (10) days (excluding Saturdays, Sundays and Federal holidays) after receipt of the request, Such acknowledgement may request additional information to assist the Commission in locating the record, or it may advise the individual that no record exists about that individual.

(b)(1) Upon submission of proof of identity as required by § 515.3(b)(1) or (2) of this part, the Commission shall respond within ten (10) days (excluding Saturdays, Sundays and Federal holidays). The Commission shall decide whether to make a record available to the record subject and shall immediately convey its determination to the requester. If the individual asks to see the record, the Commission may make the record available at the location where the record is maintained.

(2) The Commission shall furnish each record requested by an individual under this section in a form intelligible to that individual.

(3) If the Commission denies access to a record to an individual, that person shall be advised of the reason for the denial and of the appeal procedures provided in § 515.7 of this part.

(4) Upon request, an individual shall be provided access to the accounting of disclosures from his or her record under the same procedures as provided above and in § 515.3 of this part.

§ 515.5 Request for amendment to record.

(a) Any individual who has reviewed a record pertaining to him or her that was furnished under this part, may request that the Commission amend all or any part of that record.

(b) Each individual requesting an amendment shall send the request to the Records Manager.

(c) Each request for an amendment of a record shall contain the following information:

(1) The name of the individual requesting the amendment;

(2) The name of the system of records in which the record sought to be amended is maintained;

(3) The location of the system of records from which the individual record was obtained;

(4) A copy of the record sought to be amended or a sufficiently detailed description of that record:

(5) A statement of the material in the record that the individual desires to amend;

(6) A statement of the basis for the requested amendment, including any material that the individual can furnish to substantiate the reasons for the amendment sought.

§ 515.6 Review of request for amendment of record by the Records Manager.

(a) The Records Manager shall, not later than ten (10) days (excluding Saturdays, Sundays and Federal holidays) after the receipt of a request for an amendment of a record under § 515.5 of this part, acknowledge receipt of the request and inform the individual whether more information is required before the amendment can be considered.

(b) If more information is not required, within ten (10) days after receipt of the request (excluding Saturdays, Sundays and Federal holidays), the Records Manager shall either make the requested amendment or notify the individual of the Commission's refusal to do so, including in the notification the reasons for the refusal, and the appeal procedures provided in § 515.7 of this part.

(c) The Records Manager shall make each requested amendment to a record if such amendment will tend to negate inaccurate, irrelevant, untimely, or incomplete material in the record.

(d) The Records Manager shall inform prior recipients of any amendment or notation of dispute of such individual's record. The individual may request a list of prior recipients if there exists an accounting of the disclosures.

§ 515.7 Appeal to the Commission of initial adverse agency determination on access or amendment to records.

(a) Any individual whose request for access or an amendment has been denied in whole or in part, may appeal the decision to the Commission no later than one hundred eighty (180) days after the adverse decision is rendered.

(b) The appeal shall be in writing and shall contain all of the following information:

(1) The name of the individual making the appeal;

(2) Identification of the record sought to be amended;

(3) The record system in which such record is contained;

(4) A short statement describing the amendment sought; and

(5) The name and location of the agency official who initially denied the amendment.

(c) Not later than thirty (30) days (excluding Saturdays, Sundays and Federal holidays) after the date on which the Commission receives the appeal, the Commission shall complete its review of the appeal and make a final decision thereon. For good cause shown, however, the Commission may extend such thirty (30) day period. If the Commission extends the period, the individual requesting the review shall be promptly notified of the extension and the anticipated date of a decision.

(d) After review of an appeal, the Commission shall send a written notice to the requester containing the following information:

(1) The decision and, if the denial is upheld, the reasons for the decision;

(2) The right of the requester to file with the Commission a concise statement setting forth the reasons for his or her disagreement with the Commission's denial of access or amendment. The Commission shall make this statement available to any person to whom the record is later disclosed, together with a brief statement, if appropriate, of the Commission's reasons for denying requested access or amendment. The Commission shall also send a copy of the statement to prior recipients of the individual's record; and

(3) The right of the requester to institute a civil action in a Federal district court for judicial review of the decision.

§ 515.8 Disclosure of record to a person other than the individual to whom it pertains.

(a) Any individual who desires to have a record covered by this part disclosed to or mailed to another person may designate such person and authorize such person to act as his or her agent for that specific purpose. The authorization shall be in writing, signed by the individual, and notarized or witnessed as provided in § 515.3 of this part.

(b) The parent of any minor individual or the legal guardian of any individual who has been declared by a court of competent jurisdiction to be incompetent, due to physical or mental incapacity or age, may act on behalf of that individual in any matter covered by this section. A parent or guardian who desires to act on behalf of such an individual shall present suitable evidence of parentage or guardianship, by birth certificate, certified copy of court order, or similar documents, and proof of the individual's identity in a form that complies with § 515.3(b) of this part.

(c) An individual to whom a record is to be disclosed in person, pursuant to this section, may have a person of his or her own choosing accompany him or her when the record is disclosed.

§ 515.9 Fees.

The Commission shall not charge an individual for the costs of making a search for a record or the costs of reviewing the record. When the Commission makes a copy of a record as a necessary part of reviewing the record, the Commission shall not charge the individual for the cost of making that copy. Otherwise, the Commission may charge a fee sufficient to cover the cost of duplication.

§ 515.10 Penalties.

Any person who makes a false statement in connection with any request for a record, or an amendment thereto, under this part, is subject to the penalties prescribed in 18 U.S.C. 494 and 495.

§ 515.11 General exemptions. [Reserved]

§ 515.12 Specific exemptions.

(a) The following system of records is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1) and (f):

Indian Gaming Individuals Records System

(b) The exemptions under paragraph (a) of this section apply only to the extent that information in this system is subject to exemption under 5 U.S.C. 552a(k)(2). When compliance would not appear to interfere with or adversely affect the overall responsibilities of the Commission with respect to licensing of key employees and primary management officials for employment in an Indian gaming operation, the applicable exemption may be waived by the Commission.

(c) Exemptions from the particular sections are justified for the following reasons:

(1) From 5 U.S.C. 552a(c)(3), because making available the accounting of disclosures to an individual who is the subject of a record could reveal investigative interest. This would permit the individual to take measures to destroy evidence, intimidate potential witnesses, or flee the area to avoid the investigation.

(2) From 5 U.S.C. 552a(d), (e)(1), and (f) concerning individual access to records, when such access could compromise classified information related to national security, interfere with a pending investigation or internal inquiry, constitute an unwarranted invasion of privacy, reveal a sensitive investigative technique, or pose a potential threat to the Commission or its employees or to law enforcement personnel. Additionally, access could reveal the identity of a source who provided information under an express promise of confidentiality.

(3) From 5 U.S.C. 552a(d)(2), because to require the Commission to amend information thought to be incorrect, irrelevant, or untimely, because of the nature of the information collected and the length of time it is maintained, would create an impossible administrative and investigative burden by continually forcing the Commission to resolve questions of accuracy, relevance, timeliness, and completeness.

(4) From 5 U.S.C. 552a(e)(1) because:

(i) It is not always possible to determine relevance or necessity of specific information in the early stages of an investigation.

(ii) Relevance and necessity are matters of judgment and timing in that what appears relevant and necessary when collected may be deemed unnecessary later. Only after information is assessed can its relevance and necessity be established.

(iii) In any investigation the Commission may receive information concerning violations of law under the jurisdiction of another agency. In the interest of effective law enforcement and under 25 U.S.C. 2716(b), the information could be relevant to an investigation by the Commission.

(iv) In the interviewing of individuals or obtaining evidence in other ways during an investigation, the Commission could obtain information that may or may not appear relevant at any given time; however, the information could be relevant to another investigation by the Commission.

[FR Doc. 93-1063 Filed 1-21-93; 8:45 am]
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25 CFR Parts 531, 533, 535, 537 and 539

RIN 3141-AA03

Management Contract Requirements and Procedures Under the Indian Gaming Regulatory Act

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission is establishing this rule in chapter III of title 25 of the Code of Federal Regulations (Parts 500-599). This rule implements the management contract provisions of the Indian Gaming Regulatory Act of 1988 by establishing the requirements and procedures for the approval of management contracts concerning Indian gaming operations and the conduct of related background investigations.

EFFECTIVE DATE: February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Fred W. Stuckwisch, National Indian Gaming Commission, Suite 250, 1850 M Street, NW, Washington, DC 20036-5083; telephone: 202-632-7003; by facsimile: 202-632-7066 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background.

The Indian Gaming Regulatory Act (IGRA, or the Act), 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act established the National Indian Gaming Commission (NIGC, or the Commission). Under the IGRA, the Commission is charged with regulating class II gaming, and certain aspects of class III gaming.

On August 15, 1991, the Commission published final rules (56 FR 40702) requiring class II gaming operations to compute and pay to the Commission the annual fees required by section 2717 of the Act. On April 9, 1992, the Commission published a final rule (57 FR 12382) that defines key statutory terms, notably clarifying the distinctions between class II gaming (regulated by tribes and the Commission) and class III gaming (regulated primarily under negotiated tribal-state compacts).

The Commission also has proposed rules regarding its review and approval of tribal gaming ordinances and resolutions under sections 2710 and 2712 of the Act (57 FR 30346, July 8, 1992), Privacy Act procedures under the Privacy Act of 1974 (57 FR 30353, July 8, 1992), compliance and enforcement procedures under sections 2705 and 2706 of the Act (57 FR 30584, July 9, 1992), and disclosure of information under the Freedom of Information Act (57 FR 55212, November 24, 1992). In the near future, the Commission will publish proposed rules regarding requirements under the National Environmental Policy Act and tribal self-regulation under section 2710(c) of the Act.

On Wednesday, August 19, 1992, the Commission proposed regulations covering management contract requirements and procedures (57 FR 37656-37662). Those rules are being published in final form today.

In the preamble to the proposed rules (57 FR 37656, August 19, 1992), the Commission provided a discussion of the rule's provisions and invited the public to comment generally on the form and content of the regulations and specifically on (1) its determination that management contracts concerning class III gaming are subject to the same background investigation requirements as class II under the IGRA, and (2) its preliminary determinations under Executive Order 12291 and the Regulatory Flexibility Act. Comments received and the Commission's responses to those comments are summarized below.

General Comments

BIA Guidelines

One commenter asked about the effect of the guidelines issued by the Bureau of Indian Affairs (BIA) in April 1992 once the final regulations are adopted.

Response: The management contract regulations, once they become final and effective, will supersede that portion of the guidelines that relate to the review and approval of management contracts. Those who are regulated under the Act must comply with the regulations.

Section 81

Another commenter, arguing that Section 81 remains in full force and effect, including the citizen suit provision, and that the Commission has been substituted for the Secretary in carrying out continuingly valid provisions of Section 81, urged the Commission to include a statement to that effect.

Response: The Commission agrees with the commenter that section 81 remains in full force and effect, including the citizen suit provision. The IGRA contains no express repeal of section 81.

Commission's Role in Class III Gaming

Several commenters took issue with the Commission's preliminary determination that the IGRA authorizes the Chairman to conduct background investigations and otherwise determine the suitability of persons having a financial interest in or management responsibility for a management contract concerning class III gaming (57 FR 37657-37658). Other commenters agreed with the Commission's initial position.

Response: The Commission now agrees with the commenters who argue that under the IGRA the responsibility for conducting background investigations and determining the suitability of persons or entities having a financial responsibility in a management contract for class III gaming falls to the tribe or state pursuant to a tribal-state compact and not to the Chairman. Section 2710(d)(9) of the IGRA provides that "(t)he Chairman's review and approval of such contracts (for class III gaming) shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12." Excluded are subsections (a) (background information on persons or entities which must be provided to the Commission), (e) (grounds for disapproving a management contract), and (i) (requiring a potential contractor to pay a fee to cover the cost of a background investigation). When the excluded subsections are read together, it becomes evident that Congress did not intend for the Chairman to conduct background investigations on persons or entities involved in class III gaming, but to insure that a management contract complied with the other requirements of the IGRA, such as limits on the term of years, limits on the division of net revenues, and adequate accounting procedures.

Although the disparate, more limited review of class III management contracts is not explained in the IGRA's legislative history, it is consistent with the overall regulatory scheme of the IGRA which vests in the Commission the responsibility to oversee the regulation of class II gaming while leaving to the tribes and states the responsibility to regulate class III gaming. This bifurcation of responsibilities, which makes the Chairman responsible only for conducting background investigations on persons or entities having an interest in a management contract for class II gaming, may give rise to varying, and possibly, conflicting standards for conducting background investigations and determining the suitability of persons involved in Indian gaming. It could also result in a situation where no background investigation is conducted because the IGRA does not mandate that any particular subject be included in a tribal-state compact. The Commission is hopeful that these potential problems can be avoided.

While the Chairman may not have the responsibility for conducting background investigations on persons or entities with an interest in a management contract concerning class III gaming, the Commission believes that the IGRA does not preclude the Chairman from disapproving a management contract concerning class III gaming based on the ground contained in section 2711(e)(1)(D) of the IGRA. That provision provides that the Chairman shall not approve a management contract if the Chairman determines that a person or entity "poses a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of related business and financial arrangements." It is the view of the Commission that Congress did not intend for the Chairman to disregard information in his or her possession that indicates that a person is unsuitable for Indian gaming. To do so would undermine one of the fundamental policies of the IGRA—"to shield (tribes) from organized crime and other corrupting influences." 25 U.S.C. 2702(2). Thus, while the Chairman will not conduct background investigations on class III contractors, the Chairman may disapprove a management contract concerning class III gaming based on information in the possession of the Commission that indicates that such person is unsuitable for Indian gaming under the standard contained in § 533.6(c).

Approval Requirements

One commenter urged that the Commission not attempt to approve management contracts that were approved by the Secretary after IGRA was enacted or attempt to modify or void such contracts without a hearing. The commenter argued that the regulations fail to distinguish between contracts approved by the Secretary prior to the enactment of IGRA, which require Commission approval, and contracts approved by the Secretary after the enactment of IGRA, which do not.

Response: The Commission disagrees. Sections 2710(d)(9) and 2711(a)(1) of the IGRA provide that the Chairman must approve all management contracts, whether or not the Secretary has approved them. The only distinction the Act makes for those contracts approved prior to the enactment of the IGRA is that the parties are given additional time to bring the contract into compliance (Section 2712(c)(3)). The Commission has, however, modified the content requirements for contracts that have been approved by the Secretary by eliminating those contained in § 531.1(a), (b), (k), (l), (m), and (n).

Business Judgments

One commenter suggested that the tribes, not the Chairman, should make judgments and decisions as to business details of contracts. In the view of this commenter the Commission's role should be limited to providing technical assistance in the negotiation process to ensure that tribal governments negotiate contracts in the best interest of the tribe and not "outside forces."

Response: The IGRA does give the Commission the authority to disapprove a contract if "a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract." 25 U.S.C. 2711(e)(4). The Commission dies not, however, intend to second-guess the business decisions of a tribe. Consequently, it is the responsibility of all tribal governments to negotiate contracts in the best interests of their tribes.

Another commenter contended that the proposed regulations are overreaching in the ability of the Chairman to reject the contractual terms and second-guess the business decisions of the tribes. The regulations should contain a presumption that the decisions of the tribe are reasonable unless there is clear and convincing evidence to the contrary.

Response: As indicated elsewhere, the Commission does not intend to micro-manage a tribe's business.

Self-Regulation

One commenter urged that self-regulation be addressed as soon as possible.

Response: The Commission agrees. The IGRA provides that a tribe which operates a class II gaming operation and has complied with the various provisions of the IGRA may apply for a certificate of self-regulation. Some of those provisions require regulations; the Commission must propose and finalize such regulations before a tribe may apply for a certificate of self-regulation.

Piecemeal Regulation

One commenter suggested the Commission should not take the piecemeal approach in the drafting of the regulations.

Response: The Commission disagrees. As stated elsewhere, the promulgation of all regulations in a single package would take so long and be such a sizeable undertaking that necessary guidance would be unduly delayed.

Negotiated Rulemaking

The same commenter urged that negotiated rulemaking be used.

Response: The Commission disagrees. Because Congress spelled out specific requirements that the Commission could not ignore, negotiated rulemaking was not suitable. Interested parties have been given ample opportunity to review, comment on, and discuss with Commissioners and staff the Commission's thinking with respect to management contract regulations.

Collateral Economic Activities

A commenter argued that the Commission must extend its regulatory authority over collateral economic activities such as gift shops, food and beverage services, custodial services and security services if the regulatory scheme is to have full effect and if the goal of Congress to encourage clean, profitable gaming is to be realized.

Response: The Commission does not disagree with the merits of the commenter's arguments but notes that there are statutory limitations to doing what the commenter suggests. The IGRA gives the Commission regulatory oversight over gaming operations, not other tribal businesses.

The FBI and State Gaming Authorities

A commenter suggested that the regulations should require that a copy ot the management contract application, with all attachments, should be forwarded to the appropriate state gaming authority and to the FBI at the same time that these documents are forwarded to the Commission for approval.

Response: The Commission disagrees. The Act does not provide for such a requirement and it is doubtful that the FBI or state gaming authorities would want to routinely receive management contracts.

Definition of Management Contractor

One commenter asked whether the Commission considered a "bright line" definition of "management contractor" which focuses on the ultimate decision-making authority or basis of compensation to identify a management contractor rather than on functions performed.

Response: The Commission considered many alternative definitions of "management contractor" in connection with the promulgation of its definition regulations and believes that the definition of a management contract in the final rule is sufficiently clear.

Definition of a Management Contract

Another commenter argued that the proposed regulations, together with the overbroad definition of a management contract (because of the many contracts that could be included), is unworkable for both the Commission and the tribe because it subjects numerous contracts to the regulatory requirements. The commenter suggested that the regulations should specifically delineate what is and what is not a management contract.

Response: The Commission disagrees. The definition adopted by the Commission is not overly broad and covers those contracts where a management role is present.

Part 531—Content of Management Contracts

Contract-Compact Conflicts

One commenter suggested that § 531.1 should require that the contracts include an order of precedence provision to the effect that the compact controls where there is a conflict between provisions of the management contract and the governing compact.

The same commenter suggested that § 531.1(a), Governmental Authority, be revised by adding "and in conformance with the governing tribal/state gaming compact" before the semicolon.

Response: While the Commission is in general agreement that management contracts should not be inconsistent with the requirements contained in a tribal-state compact (unless those requirements are contrary to the statutory provisions of the IGRA relating to management contracts), the Commission does not agree that the regulations should be modified to require that a management contract must conform to a tribal-state compact. Enforcement of the requirements of the compact should be the responsibility of the tribe or the state; it is not the responsibility of the Commission.

Compliance With the Act

Another commenter pointed out that the preamble to the proposed regulations indicated that a management contract must provide that all gaming will be conducted in accordance with the governing tribal ordinance and suggested that consideration be given to indicating that all gaming will be conducted in accordance with the Act as well as the governing tribal ordinance.

Response: The Commission agrees and has revised § 531.1(a) accordingly. The Commission believes that any reader of such a contract should be made aware that it is subject to all the provisions of the Act.

Changes in Gaming Ordinances

One commenter suggested that § 531.1(a) should require the management contract to state how changes in gaming ordinances that affect contract terms will be handled.

Another commenter argued that neither the preamble nor the final rule should contain a statement or requirement such as that contained in the preamble to the proposed rule advising that "the management contract also should state how any changes to the ordinance that affect contract terms will be handled." Such a statement, the commenter argued, is unnecessary and confuses the tribes two roles as sovereign and party to the management contract.

Response: The Commission disagrees with both commenters. The parties to the contract should be aware of and deal with the inter-relationships between the contract and the governmental authority of the tribe that can be exercised through ordinances and resolutions.

Assignment of Responsibilities

One commenter suggested that § 531.1(b), Assignment of Responsibilities, is not required by IGRA and should be omitted from the final rule or limited to those items listed in the proposed rule.

Response: The Commission disagrees. It is in the best interest of Indian gaming to deal with as many contractual issues as possible in advance.

Another commenter felt that § 531.1(b) should be changed if it is the intent of the Commission that the items listed are the only functions for which responsibility is to be enumerated.

Response: Such is not the intent of the Commission as evidenced by the use of the word "including."

Responsibility for Auditors

One commenter argued that § 531.1(b)(7) should be deleted or reworded to provide that independent auditors will be directly engaged and scheduled by the tribe and shall report directly to the tribal government.

Another commenter urged that § 531.1(b)(7) be changed to require hiring and scheduling of auditors solely by the tribe.

Response: The Commission agrees in part and has revised the rule by limiting the assignment of responsibility concerning auditors to "paying for the services of the independent auditor engaged pursuant to § 571.12 of this chapter."

Police Protection

One commenter suggested that the regulations make clear that the tribe and contractor must make proper arrangements with local law enforcement for adequate police protection.

Response: The Commission believes that the provision of law enforcement and police protection are the responsibility of the tribe and need not be addressed in the management contract. However, the incremental cost of law enforcement and police protection resulting from the gaming operation should be dealt with in the contract. Accordingly, § 531.1(b) has been expanded by adding paragraph (15): "paying the cost of any increased public safety services."

NEPA Requirements

The Commission has added § 531.1(b)(16) to require the parties to the contract, when applicable, to assign responsibility for supplying the Commission with all information necessary for it to comply with the regulations of the Commission to be issued shortly pursuant to the requirements of the National Environmental Policy Act (NEPA).

Financial Reports

One commenter inquired whether § 531.1(d) should be changed to require that a management contractor provide certain financial reports "not less frequently than monthly" to facilitate the tribe receiving more frequent accountings of gaming revenues.

Response: The Commission agrees and has revised the rule accordingly.

Guaranteed Payments

Another commenter asked if the Commission intended that the guaranteed payments required in § 531.1(f) be a debt instrument.

Response: It is not intended that this payment obligation cover the entire contract period and be recorded at the outset or reflected in a debt instrument. This is a month-to-month obligation of the gaming operation which is to be recorded and paid as incurred.

One commenter said that § 531.1(f) provides virtually no protection to the tribe and that the Commission should develop a mechanism to ensure that a meaningful guaranteed monthly minimum payment is provided to a tribe either as a minimum dollar amount or a percentage of the anticipated net revenues.

Response: The Commission disagrees. It is not possible to develop a useful regulatory mechanism or formula that will ensure that a tribe receives an adequate guaranteed payment. The purpose of this provision is to assure that a payment be made regardless of the requirement for repayment of development and construction costs.

Term Limitations

This same commenter felt that § 531.1(h) should indicate what showing must be made to justify a longer term, including a description of the relationship between capital and income which is necessary to receive approval for a seven year contract.

Response: The Commission disagrees. Each situation is unique because in each, location of the gaming operation is the most important factor.

Two commenters urged that § 531.1(h) indicate when the term of a management contract begins for purposes of calculating the term limit. One commenter suggested that the time be counted from the opening of the gaming facility.

Response: The Commission agrees that the regulations should clarify when the term of a management contract begins and has revised the rule to add a requirement that "the time period shall begin running no later than the date when the gaming activities authorized by an approved management contract begin."

One commenter urged that § 531.1(h) be expanded to add this additional sentence: "However, the assumption by the Chairman will be that such term is economically reasonable when so requested by the tribe and will be approved by the Chairman."

Response: The Commission disagrees; such changes would be contrary to the statute.

Percentage Fee Limitations

This same commenter urged that § 531.1(i)(2) be expanded to add the same additional sentence.

Response: The Commission disagrees; these changes would be contrary to the statute.

Another commenter urged that § 531.1(i) should be expanded to include the standards that will be used to judge whether a higher percentage fee is justified.

Response: The Commission disagrees. Each situation is unique because in each, location of the gaming operation is the most important factor.

A commenter asked if a management contract provides for a fixed fee, must that fee not be in excess of the percentages provided for in § 531.1(i)?

Response: The answer is no. The use of a percentage fee to compensate the management contractor is optional and the percentage fee limitations would not apply to other methods of compensation.

Licensing Disputes

One commenter asked whether § 531.1(k) should be revised to specifically address licensing disputes between the tribe and the management contractor involving third parties.

Response: The Commission believes not. It is up to the tribe in its governmental capacity to make licensing determinations.

Dispute Resolution

Another commenter argued that the regulations should not impose the dispute resolution requirements contained in § 531.1(k) since IGRA contains no such requirement.

Response: The Commission disagrees. The Commission was given the authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act." (25 U.S.C. 2706(c)(10)) The Commission believes it is in the best interest of Indian gaming to anticipate the need for, and deal with, the resolution of disputes in advance.

Assignments and Subcontracting

A commenter urged that § 531.1(1) be changed to limit the assignment provisions to class II and previously approved class III contracts and subcontracting provisions relating only to gaming activities.

Response: The Commission disagrees. It believes that all management contracts not previously approved by the Secretary should indicate whether and to what extent contract assignments and subcontracting are permissible.

This same commenter questioned the Commission's authority to require approval of assignments and subcontracts.

Response: Any contract that requires the approval of the Chairman that is modified by assignment or subcontract, must have that modification approved.

Compact Requirements

A commenter urged that a new subsection, Terms and conditions required by compact, should be added to § 531.1 to require that the management contract shall include all provisions required to be included in such contracts by the governing tribal/state gaming compact.

Response: The Commission disagrees. The Commission was not given oversight over the tribal-state compacting process. That was left to the tribes and the states.

Effective Date

Another commenter suggested that the following language be added to § 531.1:

"(n) Effective Date. State that the contract shall not become effective unless and until the Chairman approves it, date of signature of the parties notwithstanding."

The commenter pointed out that without such a statement, a contract is normally understood to be effective upon execution (i.e., signature of the parties). Since the regulations require "after-the-fact" approval, this provision clarifies when the contractor may begin work.

Response: The Commission agrees and has added the suggested language to § 531.1 as subparagraph (n).

Long-Term Leases

One commenter asked if it is intended by § 531.2, Prohibited Provisions, that Tribes will be unable to enter into long term leases that exceed the 5–7 year time frame.

Response: The simple answer is no. However, the Commission wishes to point out that a lease cannot authorize or permit the management of a gaming operation; i.e., one cannot manage a gaming operation through a lease.

Prohibited Provisions

One commenter suggested that the Commission consider deleting § 531.2 because it merely reiterates what is already set forth in the statute.

Response: The Commission disagrees. This section is included to provide a complete reference, without having to refer to the IGRA.

Part 533—Approval of Management Contracts

General

One commenter urged that the regulations "include a provision identifying a clear and specific means of endowing a contract with approval, such as written endorsement by the Chairman * * *" and "recite that no other means or act by the Commission will constitute or be construed to constitute approval."

Response: The Commission agrees and has included a new provision in § 533.1(b) which provides "Contract approval will be evidenced by a Commission document dated and signed by the Chairman. No other means of approval shall be valid."

The same commenter argued that the regulations should provide that contract approvals by the Chairman are prospective in application only.

Response: The Commission disagrees. The Supreme Court has recognized the authority of the government to retroactively approve agreements between Indians and non-Indians. *Lykins v. McGrath*, 184 U.S. 169 (1902). There is no reason for the Commission to restrict the Chairman's authority. In most, if not all cases, however, contract approvals will be prospective only.

Another commenter opined that the regulations should require that the contracts provide "that the contractor will not interfere with or attempt to unduly influence internal affairs or governmental decisions of the tribe."

Response: The Commission does not believe that such a regulatory provision is necessary. Unduly interfering with or influencing tribal governmental decisions relating to gaming is a basis for disapproving a management contract. 25 U.S.C. 2711(e)(2).

Contracts Approved by the Secretary

One commenter argued that § 533.1 should be modified to provide that contracts approved by the Secretary remain effective.

Response: The Commission has added § 533.1(c) which provides "Contracts approved by the Secretary remain effective until approved or disapproved by the Chairman."

Failure to Submit

The Commission has added language to § 533.2(a) which provides that the Chairman may deem a contract disapproved if a tribe or management contractor fail to submit a contract previously approved by the Secretary within sixty (60) days of the Chairman's request.

Evidence of Tribal Authority

One commenter suggested that the requirement in § 533.3(b) is unnecessary in light of § 533.3(c) and should be eliminated.

Response: The Commission disagrees. Section 533.3(b) requires the tribal chairman to set forth in writing the identity and authority of the tribal official who is acting for the tribe concerning the management contract; § 533.3(c) requires the submission of the tribal documents providing and delegating such authority.

Parties to the Contract

Another commenter suggested that § 533.3(d) be changed to limit its application to class II contracts and to class III contracts previously approved by BIA.

Response: The Commission disagrees. The Commission needs to know the identity of all parties to a contract.

Background Investigations for Class III

One commenter argued that the Commission's interpretation that management contracts concerning class III gaming are subject to the same background investigation requirements as class II is erroneous and will result in needless repetition of effort and expense for tribes. Therefore, the regulations should be changed to clarify that § 533.3(d) and § 533.6 do not apply to class III gaming.

Response: The Commission has modified the background investigation requirements but disagrees as to specific changes recommended. Section 533.3(d) has been revised to require only the information identified in § 537.1(b)(1)(i) for contracts covering class III gaming. Section 533.6 has been revised to require only that the requirements of § 533.6(c) be met for contracts covering class III gaming. See also discussion captioned "Commission's role in class III" above.

Business Plan or Financial Statements

One commenter argued that § 533.3(e), which requires the submission of a business plan or financial statements, should be eliminated because it is unauthorized by IGRA, unnecessary and overbroad.

Response: The Commission disagrees. The information is needed for the Chairman and the Commission to make the judgments required under the IGRA.

One commenter asked whether § 533.3(e)(1), which requires a three year business plan for new contracts, applies to operations that have been in existence for many years and are now engaging new contractors.

Response: The Commission has added § 533.3(e)(3) which requires both a business plan and financial statements for new contracts for existing operations.

Another commenter stated that § 533.3(e)(1) is vague and should be expanded to clarify the information the Commission wants included in the 3 year business plan regarding the gaming business.

Response: The Commission agrees and has revised the provision to include the requirements enumerated in the preamble to the proposed regulations.

One commenter said that the business plan submitted under § 533.3(e)(1) should be required to cover the same period of time as the term of the proposed contract.

Response: The Commission disagrees. Plans and projections covering a period beyond three years would not be sufficiently useful.

One commenter asked the Commission to consider removing from § 533.3(e)(2) the final proviso "to the extent that such data exists."

Response: The Commission agrees and has made the suggested revision.

Term Limit Justification

The same commenter asked that the Commission consider modifying § 533.3(f) to read "If applicable, a justification, consistent with the provisions of § 531.1(h), for a term limit in excess of five (5) years, *but not exceeding seven (7) years.*"

Response: The Commission agrees and has made the suggested revision.

Fee Percentage Justification

This same commenter also asked the Commission to consider modifying § 533.3(g) to read "If applicable, a justification, consistent with the provisions of § 531.1(i), for a fee in excess of thirty (30) percent, *but not exceeding forty (40) percent.*"

Response: The Commission agrees and has made the requested revision.

Temporary Approval

One commenter asked if § 533.4 should be changed to provide for temporary approvals.

Response: The Commission believes that temporary approvals would not be appropriate.

Approval Time Limits

The same commenter asked whether the time frames for the approval process in § 533.4 should be shortened and whether the approval process should distinguish between an ongoing and a proposed casino.

Response: The Commission notes that the time frames provided are statutory and that the IGRA does not provide different requirements for ongoing versus proposed casinos.

Right to Bring Action

This same commenter argues that the right to bring an action to compel the Chairman to act provided in § 533.4(b) is without a remedy.

Response: The Commission disagrees. Compelling the Chairman to approve or disapprove a contract is the remedy.

Another commenter argues that both the tribe and the management contractor should be allowed to bring legal action to compel action on a contract under § 533.4(b).

Response: The Commission disagrees. The IGRA only authorizes a tribe to file suit in federal district court to compel the Chairman to approve or disapprove a management contract.

Retroactive Application of the Regulations

One commenter suggested that the retroactive application of the regulations provided in § 533.5 is most unwise because it has a chilling effect on management companies interested in investing in Indian gaming.

Response: The Commission notes that this provision is required by the IGRA.

Approval of Previously Approved Contracts

One commenter asked whether § 533.5 should be changed because it permits a tribe to void a management contract simply by refusing to modify an existing management contract to bring it into compliance with the rules. The commenter suggested that if so, it should provide for an "automatic" modification of management contract terms to bring them into compliance with the regulations or by providing for mandatory arbitration to resolve contract disputes.

Another commenter urged that § 533.5 be revised to provide for an alternative dispute resolution mechanism allowing an unbiased third party to facilitate the negotiation of existing management contracts to permit them to be in compliance with current law.

Yet another commenter suggested that § 533.5(b) be revised to prevent a tribe from failing to respond to a request for modification and thereby letting the contract become void. This commenter urged that if so, previously approved pre 1988 contracts should require mandatory binding arbitration after the passage of the 180 day time period.

Still another commenter argued that § 533.5(b) should be changed to add:

"provided, however, that in situations where the Chairman is reviewing a management contract which has been approved by the Secretary, he may waive any of the requirements if the Chairman determines that a Tribe is refusing to bargain in good faith in order to terminate or void an existing contract."

Response: The Commission agrees that § 533.5 should be revised to address the problem identified by the commenter but does not agree with the solutions proposed. Instead, § 533.5(b) has been revised and now reads as follows:

If a tribe and a management contractor fail to modify a management contract within the time provided, the Chairman may:

(1) Disapprove the management contract, or

(2) Approve the management contract subject to the required modifications if:

(i) The modifications all benefit the tribe,

(ii) The modifications are required to bring the contract into statutory compliance, and

(iii) The modifications are all agreed to by the management contractor.

The Commission has also added the management contractor to § 533.2 so that the tribe or the management contractor can submit the required information.

Approval Requirement

One commenter suggested that § 533.6 be changed from "may approve" to "shall approve." A second commenter said the language of § 533.6 should be changed to provide that the Chairman "shall approve the contract unless" he determines that it meets one of the conditions listed.

Response: The Commission has revised § 533.6 to track the statute.

Compact Provisions

One commenter suggested that § 533.6 be expanded to enable the Chairman to disapprove a contract for failure to comply with tribal-state compact requirements. Another commenter argued that § 533.6 should provide for disapproval of management contracts whose provisions are not consistent with, or are contrary to, the provisions of the tribe's class III gaming compact.

This same commenter also suggested that § 533.6 provide that where a compact specifically requires that certain provisions be included in a management contract, the Commission should not approve contracts which do not contain them.

Response: The Commission disagrees. The statute and the regulations govern the review and approval of management contracts, not the terms of the compacts. Furthermore, the Commission was not given the authority to enforce tribal-state compacts. That was left to the tribes and the states.

Another commenter suggested that § 533.6 be expanded to include "knowingly or willfully providing materially false statements to a state or agency of the state with responsibility for Indian gaming oversight."

Response: The Commission disagrees; as previously noted, the Commission was not given an oversight role over the tribal-state compacting process.

Gaming Offenses

One commenter suggested that it should be made clear that "gaming offense" under § 533.6(b)(2) includes misdemeanor convictions.

Response: The Commission agrees and has modified the provision, now in § 533.6(b)(1)(ii), accordingly. The regulation now reads "has been convicted of any felony or any misdemeanor gaming offense."

Void Agreements

A commenter suggested that § 533.7, which provides that management contracts not approved by the Chairman are void, is unreasonable with respect to contracts that have been approved by the Secretary.

Response: The Commission has revised § 533.7 to exclude contracts approved by the Secretary which remain valid until disapproved by the Chairman.

One commenter argued that § 533.7 should be limited to class II contracts because the Commission has no authority over class III investors.

Response: The Commission disagrees; the Commission is charged with reviewing and approving class III contracts and therefore has an interest in the parties to the contract.

Part 535—Post-Approval Procedures

General

One commenter suggested that part 535 be modified to distinguish between a simple modification and a new contract. This same commenter felt that part 535 should be modified to treat assignments as new contracts, not modifications of existing contracts.

Response: The Commission believes the suggested change is unnecessary. Both new contracts and modifications are subject to the same degree of scrutiny and review. Furthermore, it's up to the parties to decide whether and when to modify an existing contract or to enter into a new contract.

Background Investigations

One commenter suggested that § 535.1, to the extent that it applies to background investigations, be limited to class II contracts and to modifications to class III contracts previously approved by the Secretary.

Response: The Commission disagrees that its authority is limited in the manner suggested by the commenter. The Commission has, however, revised § 535.1(c)(4) to provide as follows:

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

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

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

Evidence of Tribal Authority

One commenter suggested that the requirement in § 535.1(c)(2) is unnecessary given the requirement in § 535.1(c)(3).

Response: The Commission disagrees. Section 535.1(c)(2) requires the tribal chairman to set forth in writing the identity and authority of the tribal official who is acting for the tribe concerning the management contract; § 535.1(c)(3) requires the submission of the tribal documents providing and delegating such authority.

Term Limitation

Another commenter urged that § 535.1(c)(5) should be changed to include a maximum term limit of seven (7) years.

Response: The Commission agrees and has changed the provision to read as follows:

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

Correction

Several commenters pointed out that § 535.1(c)(6) should be changed to say "percent" rather than "days."

Response: The Commission agrees and has made the change.

Percentage Fee Limitation

One commenter suggested that § 535.1(c)(6) be changed to include a maximum management fee of forty percent (40%).

Response: The Commission agrees and has added the phrase, "but not exceeding forty (40) percent," to the language of this paragraph.

Background Information

One commenter suggested that §§ 535.1(c)(4), 535.1(d), and 535.1(e) should be rewritten to limit their application to class II contracts.

Response: The Commission has revised § 535.1(c)(4) to reflect the elimination of certain background investigation requirements for class III contracts. The other two sections have not been changed in the manner suggested.

Another commenter, noting that the proposed rule provided for a 30 day appeal period when a modification is disapproved, suggested that the proposed rule be clarified to remove any ambiguity as to when the 30 day appeal period begins.

Response: The Commission agrees and has revised § 535.1(d)(2) to include notification pursuant to the service provisions of part 519 of this chapter.

Approval

One commenter suggested that § 535.1(e) be changed from "may approve" to "shall approve."

Response: The Commission has considered the question raised and revised § 535.1(e).

Compact Requirements

One commenter argued that § 535.1(e)(2) should be expanded to enable the Chairman to disapprove a contract for failure to comply with tribal-state compacting requirements.

Response: The Commission disagrees for the reasons already discussed.

Assignment Approval

One commenter argued that § 535.2, to the extent that it applies to background investigations, should be limited to class II contracts and to modifications to class III contracts previously approved by the Secretary.

Response: The Commission disagrees. The Commission is interested in the identity of the parties to all contracts for gaming, whether or not a background investigation is required.

Post-Approval Noncompliance

One commenter agreed that § 535.3 is too broad in that it refers to "any action or condition that violates the standards contained in this chapter," where "this chapter" encompasses all the Commission's regulations. The section should be amended to refer only to violations of section 2711 or the specific sections of the regulations implementing section 2711.

Response: The Commission agrees and has revised § 535.3 by substituting parts 531, 533, 535, and 537 for "this chapter."

Hearings and Appeals

One commenter argued that both § 535.3 and § 539.2 should be changed to conform to IGRA and provide for a hearing (including oral and written presentations) prior to a determination to modify or void a contract. The same commenter also recommended that the Commission eliminate any administrative appeal from decisions on management contracts.

Response: The Commission disagrees. Under IGRA, notice and hearing are required only under section 2711(f), which deals with the Chairman's reconsideration of his/her prior approval of management contracts. This section applies only to the contracts that have been approved by the Chairman. In addition, under IGRA, decisions on management contracts are subject to administrative appeal. New contracts are covered under section 2705(a)(4) (referring to Commission appeals of Chairman's approval of management contracts in sections 2710(d)(9) and 2711 and existing contracts through section 2712(a)(2) (which incorporates the process of section 2711). Section 535.3, however, has been revised to provide a hearing prior to a determination to modify or void a contract.

Part 537—Background Investigations for Persons or Entities with a Financial Interest in, or Having Management Responsibility for, a Management Contract

General

One commenter argued that "* * * some mechanism, such as an NCIC check, is needed to provide provisional approvals of management contractors within thirty days of submission."

Response: The Commission disagrees. IGRA clearly requires advance approvals of management contractors.

One commenter suggested that the "regulations create a mechanism under which the Commission could review the background investigation systems mandated by Tribal-State compacts, and—if in the Commission's view those systems adequately protect the Tribes and the public—the Commission could accept the results of the compact-required systems as sufficient for the Commission's purposes."

Response: The Chairman or the Commission has the responsibility to conduct background investigations and to make suitability determinations based on those background investigations for class II gaming only. Furthermore, it would be inconsistent with this responsibility to delegate this task to someone outside the Commission.

One commenter suggested that the rule regarding background investigations require the Commission to employ Indian preference, use the most cost-effective contractor available, and provide consultation with the tribe.

Response: The Commission agrees as to the desirability of these suggested actions but does not believe these are appropriate matters to be addressed by the regulations.

One commenter said that the Commission should bear the cost of the background investigation in light of the fees it receives.

Response: The Commission disagrees; this would be contrary to the IGRA.

One commenter questioned the Commission's decision with respect to class III gaming to "rely to the maximum extent possible on background investigations conducted by a tribe or state pursuant to a tribal-state compact." In the view of this commenter, independent government background investigations are essential to ensure that uniform and adequate standards are met.

Response: Although it will not be conducting background investigations for class III gaming, the Commission believes that it may rely on the work of others in conducting background investigations and intends to do so for class II gaming. The Commission believes that such an approach can save time and money. The Commission, however, remains responsible for the quality of the work performed and for all determinations based on such information.

Scope of Coverage

One commenter suggested that in light of the express provisions of section 2710 of the IGRA, part 537 should be revised to limit the requirements for background investigations of persons with a financial interest in, or having management responsibility for, a management contract to class II contracts and to existing class III contracts previously approved by the Secretary.

Another commenter argued that part 537 should be limited to class II background investigations because the IGRA does not authorize the Commission to perform background investigations of class III management contractors. According to this commenter, section 2710(d)(3)(C) and (9) give this authority to the tribes and states.

Yet another commenter felt that part 537 should be rewritten to exclude class III contracts from its application.

Conversely, one commenter said the Commission had reached an appropriate conclusion in determining that under part 537 the same standards that apply to class II background investigations apply to approval of class III management contracts.

Response: The Commission has considered these comments and revised the regulations to require background information and investigations for only class II contracts and the identifying information specified in § 537.1(b)(1)(i) for class III contracts. (See discussion above under "Commission's role in class III gaming.")

One commenter suggested that part 537 be revised to require background investigations of persons having an ownership interest of 5 percent.

Response: The Commission has revised the regulations to require background investigations on the ten (10) owners with the largest interests in an entity. In many if not most cases this should cover 5% owners.

Background Information

The same commenter argued that the Commission should require biographical, residence and employment history for affected persons since the age of 18.

Response: The Commission agrees that additional background information would be useful and has revised the regulations to require all the specified information for the previous ten (10) years; the city, state and country of residence from age eighteen (18) forward; and, personal references at each residence for the most recent five (5) years.

Conduct of Background Investigations

Another commenter suggested that in order to provide greater flexibility, proposed § 537.1 should be modified to indicate "The Chairman shall conduct or cause to be conducted a background investigation * * *."

Response: The Commission agrees and has made the suggested change.

Approval Time Limits

One commenter suggested that, for those contracts where background investigations under § 537.1 are completed by the tribes or the states, the Commission should provide a shorter approval deadline.

Response: The Commission disagrees. It is not possible for the Commission to commit to a time limitation without knowing the nature and extent of the information it may be receiving from the tribes or the states.

Coverage

One commenter observed that § 537.1 provides for background investigations of certain persons with indirect financial interests and persons with less than a 10 percent interest in a corporation. The commenter objects, arguing that this approach subjects to investigation more persons than IGRA intended.

Another commenter asked if § 537.1(a) is overly broad by requiring background investigations of the top ten (10) shareholders. This commenter recommended that the provision be revised to conform to the statutory requirements.

Response: The Commission agrees that the proposed regulation extends the requirements of section 2711(a)(1)(A) of the IGRA; this was intentional and within the authority of the Commission (25 U.S.C. 2706(b)(3)).

Overlapping coverage

Another commenter suggested that § 537.1(a)(1), which requires the Commission to perform a background investigation of each person with management responsibility for a management contract, be deleted because the tribe is already required to perform a background investigation.

Response: The Commission disagrees. The Commission is responsible for conducting the background investigations and making suitability determinations in connection with class II management contractors. As previously noted, the Commission will use the work of others to the extent it can but will not delegate the authority to make suitability determinations.

Coverage under definition regulations

One commenter asked whether § 537.1(a)(3) should be changed to clarify this requirement in light of the definition of "person having a direct or indirect financial interest" in § 502.17 of the definition regulations.

Another asked whether § 537.1(a)(3) should be deleted and § 537.1(a) should be rewritten to follow the language of the Act and to eliminate any inconsistencies with § 502.17 of the definition regulations.

Yet another commenter observed that § 537.1(a) requires the Chairman to conduct background investigations on a group of individuals which may be different than the group designated under the statutory language or the Commission's definition of "persons having a direct or indirect financial interest in a management contract."

Under the proposed regulation not all partners or trustees would be investigated but persons with less than 10 percent interests in a company could be investigated. The commenter suggests that both of these results are contrary to the IGRA.

Response: The Commission acknowledges that the set of persons for which background investigations are required and for which the Chairman must make suitability determinations under the regulations is different from the set of persons identified in the definition regulations under § 502.17. The Commission believes this is both appropriate and authorized under the IGRA.

The Commission does not believe that it would be appropriate to subject all partners of a partnership and all beneficiaries of a trust with interests in a management contract to background investigations and suitability determinations while at the same time ignoring persons with a 9 percent interest in a management contract. Therefore, the Commission has exercised its authority and judgement and used different criteria for selecting persons to be subjected to background investigations and suitability determinations.

The Commission is requiring management contractors to identify and provide information about all entities with an interest in the management contract and to identify the ten (10) natural persons who have the largest financial interest in those entities. While it is conceivable that this could result in identifying hundreds of individuals with an interest in the management contract, the Commission does not believe as a practical matter that this will occur frequently or that it will create an unreasonable burden.

Once all the individuals are identified, the management contractor is to identify the ten (10) persons with the largest financial interest in the management contract and furnish complete background information on these persons. It is these people who will be subjected to background investigations and for whom the Chairman must make suitability determinations.

Disclosure Requirements

One commenter suggested that § 537.1(b) require disclosure of ownership interests in businesses other than those involving Indian tribes and gaming.

Response: The Commission disagrees. The financial statements being submitted will provide the same information sought through the suggested change.

One commenter suggested that § 537.1(b)(1)(iii) should be changed to require only the applicant's current driver's license number.

Response: The Commission agrees and has revised § 537.1(b)(1)(ii) accordingly.

One commenter suggested that § 537.1(b)(1)(ix) and § 537.1(b)(1)(x) should be expanded to add "pleas of guilty or nolo contendere for which no conviction resulted under state law."

Response: The Commission agrees and has revised the regulations to add § 537.1(b)(1)(xii):

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

Privacy Notice

A commenter suggested that § 537.1(b)(4) should be modified replacing the term "Indian gaming" with the group of individuals from whom this information will be sought.

Response: The Commission agrees and "Indian gaming" has been replaced by the phrase "individuals with a financial interest in, or having management responsibility for, a management contract."

Notice Regarding False Statements

Another commenter suggested that § 537.1(b)(5) be revised to limit its application to those who "knowingly and willfully" provide false statements, and for greater consistency with 25 U.S.C. 2711(e)(1)(C).

Response: The Commission notes that the statute cited in § 537.1(b)(5) contains "knowingly and willfully." The Commission has added this phrase to the regulation as well.

A commenter suggested that § 537.1(c) should require entities and individuals to respond to questions put by the Chairman and should provide for penalties for false statements.

Response: The Commission agrees and has made the recommended change.

Clarification

One commenter suggested that § 537.1(c)(1) be modified by separating the list of persons from whom the information is required from the paragraph which identifies what the required information shall be.

Response: The Commission agrees and has revised both § 537.1(a) and § 537.1(c) to clarify the requirements.

Multiple Sites or Operations

One commenter asked whether the fee structure under § 537.3 will be applicable to multi-site licensing requiring the payment of a separate fee for each gaming location which a management contractor seeks to operate.

Another commenter asked whether § 537.3 should be changed to provide a single fee for an investigation of a management contractor regardless of the number of operations involved.

(Readers please note that both commenters erroneously interpreted this provision as providing for the amount of the fee rather than the amount of the deposit.)

Response: A separate deposit will be required for each location and operation that a management contractor seeks to operate. However, investigative work will not be duplicated and investigative costs will be reduced.

Guarantee Bonds

One commenter opined that the bonds required by § 537.3 appear excessive. This commenter asked the Commission to explain the rationale for the size of the bonds.

Response: The purpose of the bonds is to assure that the Commission gets reimbursed for costs incurred in investigating persons or entities with a financial interest in, or having management responsibility for, a management contract. The bonds must be large enough to ensure that the investigative work is not impeded and that the investigation can be completed as quickly as possible. It is the Commission's view that the amount of the bonds is not large considering the magnitude of the responsibility the management contractor is seeking to acquire.

Coverage

One commenter suggested that § 537.3 should be limited to class II because the IRGA does not authorize the Commission to charge fees to class III management contractors for Commission background investigations.

Response: The Commission has revised its requirements and will be conducting background investigations for class II only.

Fees for Background Investigations

The same commenter argues that the fee arrangement proposed in § 537.3 for background investigations fails to provide adequate justification for the fees proposed and fails to provide adequate procedures regarding the use of the fees and possible return of the bonds.

Response: Proposed § 537.3 dealt with the amount of the bonds to be posted by the parties being investigated. The amount of the fees to be charged will be determined by the cost of the required background investigations. Each investigation will cost a different amount and the range of costs and fees is likely to be very broad. The cost of each background investigation cannot be justified in advance; it can only be determined and explained when the investigation is done. The bonds will be returned when all fees and expenses have been paid.

One commenter suggested that the requirements of § 537.3 need to be rewritten to better explain who must pay the fee. This commenter further suggested that fees for background investigations should be limited to the individual fee.

Response: The fees for background investigations must be paid by the management contractor. Both the entity and the individuals must be investigated and consequently a separate fee is required for each.

Conduct of Background Investigations

One commenter stated that the regulations should be clarified to specify who is responsible for conducting the background investigations referenced in § 537.3.

Response: The regulations as proposed make clear that the Chairman and the Commission are responsible for conducting or causing to be conducted background investigations. They will use both staff and the services of others to discharge their responsibilities.

Failure to Pay Costs

One commenter suggested that § 537.3(c) should be modified by adding a proviso which specifies the period of time allowable before failure to pay unpaid costs will result in the termination of the investigation, and which clarifies the status of the application once the investigation is terminated.

Response: The Commission agrees and has revised and expanded § 537.3 as follows:

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

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

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

Part 539—Appeals

Appeal rights

One commenter argued that § 539.2 is too broad and would give appeal rights to management company competitors, states and local entities, none of which are proper parties to an appeal. According to this commenter, "(s)tanding to bring an appeal should be limited to the tribe and the management contractor."

Response: The Commission agrees and has revised the regulations to confer appeal rights only on the parties to the management contract.

One commenter argued that the appeal process under § 539.2 provides a right without a remedy because an appeal of a contract disapproval to the Commission is unlikely to have any effect in changing the ultimate decision. In the view of this commenter the proper forum for an appeal is the federal court system.

Response: The Commission disagrees. The appeals procedure adopted by the Commission is consistent with the provisions of IGRA. *See* 25 U.S.C. 2705 and 25 U.S.C. 2714 as they relate to 25 U.S.C. 2711.

Filing Requirement

Another commenter suggested that § 539.2 should be changed to omit the 45 day filing requirement if that period expires earlier than the 30 day filing period.

Response: The Commission agrees and has changed the provision to require filing within thirty (30) days of the Chairman's determination served pursuant to part 519 of this chapter.

Commission Decision

The same commenter suggested that to ensure a timely decision that may be appealed, the last sentence of § 539.2 should be omitted and replaced with the following:

Within thirty (30) days after receipt of the appeal, the Commission shall render a decision, unless the appellant agrees to allow the Commission additional time to render a decision. In the absence of a decision within the time provided, the Chairman's decision shall constitute the final decision of the Commission.

Response: The Commission generally agrees with this comment and has revised § 539.2 to ensure the right to a timely appeal.

Administrative Appeals

One commenter suggested that § 539.2 be changed to eliminate an administrative appeal from decisions of the Chairman on modifications to a management contract that the Chairman has already approved.

Response: The Commission disagrees. Actions under § 535.3 are actions of the Chairman. Due process and 25 U.S.C. 2705 require a review of this decision by the full Commission. Such a review would constitute a final agency action appealable to the appropriate federal district court under 25 U.S.C. 2714. Hence, an appeal of the Chairman's action to the full Commission is appropriate and necessary.

Right to Appeal

Another commenter suggested that § 539.2 be revised to provide a right of appeal only upon disapproval of a management contract. This commenter also suggested that the right to appeal should be limited to the parties to the management contract which has been disapproved.

Response: The Commission disagrees that the appeals should be limited to disapprovals of management contracts. The Commission agrees, however, that appeals should be limited to the parties to the contract and have revised the regulations accordingly.

Time for Filing an Appeal

This same commenter also argued that the time for filing an appeal under § 539.2 should be 30 days from receipt of the Chairman's decision pursuant to the service requirements stated in proposed § 519.3 of this chapter.

Response: The Commission agrees that the time for filing an appeal should run pursuant to the service requirements (not necessarily receipt) and has revised the regulation accordingly.

Regulatory Matters

Executive Order 12291 and the Regulatory Flexibility Act

The Commission has determined that this document is not a major rule under Executive Order 12291. Under the Executive Order, a rule is a major rule if: (1) Its annual effect on the economy will be $100 million or more; (2) it will result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions; or (3) there will be significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign based enterprises in domestic or export markets. If a rule is major, the agency must conduct a regulatory impact analysis. The Commission believes that the rule will not have any significant effects on the economy or result in major increases in costs or prices for consumers, individual industries, federal, state, or local governments, agencies, or geographical regions. The Commission also believes that the rule will not have any adverse effects on competition, employment, investment, productivity, innovation, or the export/import market. No commenter supplied data that contradicted the Commission's tentative conclusion under E.O. 12291.

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. The Regulatory Flexibility Act requires agencies to determine whether a rule will have a significant economic impact on a substantial number of small entities. If so, an agency must prepare a regulatory flexibility analysis that explores less burdensome alternatives. If not, an agency must certify that the rule will not have such an impact. No commenter supplied data that contradicted the Commission's tentative conclusion under the Regulatory Flexibility Act.

Paperwork Reduction Act

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for approval as required by 44 U.S.C. 3501 *et seq.* and assigned clearance number 3141–0004. The approval expires on October 31, 1995, at which time the Commission will evaluate the collection requirements and seek further approval from OMB.

National Environmental Policy Act

The Commission has determined that this rulemaking 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.

Executive Order 12778

The Chairman of the National Indian Gaming Commission has certified to the Office of Management and Budget that this final rule meets the applicable standards provided in §§ 2(a) and 2(b)(2) of Executive Order 12278, "Civil Justice Reform," 56 FR 55195, October 25, 1991.

Anthony J. Hope,

Chairman, National Indian Gaming Commission.

List of Subjects in 25 CFR Parts 531, 533, 535, 537 and 539:

Gaming, Indian lands.

Title 25, Chapter III, of the Code of Federal Regulations is amended by adding parts 531, 533, 535, 537 and 539 to read as follows:

PART 531—CONTENT OF MANAGEMENT CONTRACTS

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

§ 531.1 Required provisions.

A management contract previously approved by the Secretary of the Interior shall conform to the requirements contained in paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of this section and a management contract not previously approved by the Secretary shall conform to all of the requirements contained in this section in the manner indicated.

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

(b) *Assignment of responsibilities.* Enumerate the responsibilities of each of the parties for each identifiable function, including:

(1) Maintaining and improving the gaming facility;

(2) Providing operating capital;

(3) Establishing operating days and hours;

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

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

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

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

(8) Hiring and supervising security personnel;

(9) Providing fire protection services;

(10) Setting advertising budget and placing advertising;

(11) Paying bills and expenses;

(12) Establishing and administering employment practices;

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

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

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

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

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

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

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

(3) Be susceptible to audit;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The management contractor and the tribe; and

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

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

(m) *Ownership interests.* Indicate whether and to what extent changes in the ownership interest in the management contract require advance approval by the tribe.

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

§ 531.2 Prohibited provisions.

A management contract shall not transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in the contract.

PART 533—APPROVAL OF MANAGEMENT CONTRACTS

Sec.

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

§ 533.1 Requirement for review and approval.

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

(a) Such contract shall become effective upon approval by the Chairman.

(b) Contract approval shall be evidenced by a Commission document dated and signed by the Chairman. No other means of approval shall be valid.

(c) Contracts approved by the Secretary remain effective until approved or disapproved by the Chairman.

§ 533.2 Time for submitting management contracts.

A tribe or a management contractor shall submit a management contract to the Chairman for review as follows:

(a) Contracts approved by the Secretary, within sixty (60) days after a request by the Chairman. If a tribe or a management contractor fail to submit all items under § 533.3 of this part within 60 days, the Chairman may deem the contract disapproved and shall notify the parties of their rights to appeal under part 539 of this chapter.

(b) All other contracts, upon execution.

§ 533.3 Submission of management contract for approval.

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

(a) A contract containing:

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

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

(3)(i) If the contract has been approved by the Secretary, terms that meet the requirements of §§ 531.1(c), (d), (e), (f), (g), (h), (i), and (j) and § 531.2 of this chapter; or

(ii) Terms that meet the requirements of part 531 of this chapter.

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

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

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

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

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

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

(2) For existing contracts, income statements and sources and uses of funds statements for the previous three (3) years; or

(3) For new contracts for existing operations, a three (3) year business plan which sets forth the parties goals, objectives, budgets, financial plans, and related matters, and income statements and sources and uses of funds statements for the previous three (3) years.

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

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

§ 533.4 Action by the Chairman.

(a) The Chairman shall provide notice of noncompliance under § 533.5 of this part, or shall approve or disapprove a management contract applying the standards contained in § 533.6 of this part, within 180 days of the date on which the Chairman receives a complete submission under § 533.3 of this part, unless the Chairman notifies the tribe and management contractor in writing of the need for an extension of up to ninety (90) days.

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

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

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

§ 533.5 Notice of noncompliance.

(a) If a management contract previously approved by the Secretary fails to meet the requirements of this part, the Chairman shall notify the tribe and management contractor, in writing, of the specific areas of noncompliance.

(1) The Chairman shall allow the tribe and the management contractor 120 days from receipt of such notice to modify the contract.

(2) If the Secretary approved a management contract before October 17, 1988, the Chairman shall allow the tribe and the management contractor 180 days from receipt of such notification to modify the contract.

(b) If a tribe and a management contractor fail to modify a management contract within the time provided, the Chairman may:

(1) Disapprove the management contract, or

(2) Approve the management contract subject to the required modifications if:

(i) All modifications benefit the tribe;

(ii) The modifications are required to bring the contract into statutory compliance; and

(iii) The modifications are all agreed to by the management contractor.

§ 533.6 Approval.

(a) The Chairman may approve a management contract if it meets the standards of part 531 of this chapter and § 533.3 of this part;

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

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

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

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

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

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

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

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

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

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

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

§ 533.7 Void agreements.

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

PART 535—POST-APPROVAL PROCEDURES

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

§ 535.1 Modifications.

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

(b) A tribe shall submit a modification to the Chairman upon its execution.

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

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

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

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

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

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

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

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

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

(d) For modifications which do not require a background investigation under part 537 of this chapter, the Chairman shall have thirty (30) days from receipt to approve or disapprove a modification, or to notify the parties that an additional thirty (30) days is required to reach a decision.

(1) When a modification requires a background investigation under part 537 of this chapter, the Chairman shall approve or disapprove such modification as soon as practicable but in no event later than 180 days after the Chairman receives it;

(2) If the Chairman does not approve or disapprove, he shall respond in accordance with the service provisions of part 519 of this chapter noting that no action has been taken on the proposed modification. The request shall therefore be deemed disapproved and the parties shall have thirty (30) days to appeal the decision under part 539 of this chapter.

(e) (1) The Chairman may approve a modification to a management contract if the modification meets the submission requirements of paragraph (c) of this section.

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

(3) The Chairman may disapprove a modification of a management contract for class III gaming if he or she

determines that the conditions contained in § 533.6(c) of this chapter apply.

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

§ 535.2 Assignments.

Subject to the approval of the Chairman, a management contractor may assign its rights under a management contract to the extent permitted by the contract. A tribe or a management contractor shall submit such assignment to the Chairman upon execution. The Chairman shall approve or disapprove an assignment applying the standards of, and within the time provided by §§ 535.1(d) and 535.1(e) of this part.

§ 535.3 Post-approval noncompliance.

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

PART 537—BACKGROUND INVESTIGATIONS FOR PERSONS OR ENTITIES WITH A FINANCIAL INTEREST IN, OR HAVING MANAGEMENT RESPONSIBILITY FOR, A MANAGEMENT CONTRACT

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

§ 537.1 Applications for approval.

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

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

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

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

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

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

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

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

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

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

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

(v) Current business and residence telephone numbers;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 537.2 Submission of background information.

A management contractor shall submit the background information required in § 537.1 of this part:

(a) in sufficient time to permit the Commission to complete its background investigation by the time the individual is to assume management responsibility for, or the management contractor is to begin managing, the gaming operation; and

(b) within ten (10) days of any proposed change in financial interest.

§ 537.3 Fees for background investigations.

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

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

(1) Management contractor (party to the contract)—$10,000

(2) Each individual and entity with a financial interest in the contract—$5,000

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

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

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

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

§ 537.4 Determinations.

The Chairman shall determine whether the results of a background investigation preclude the Chairman from approving a management contract because of the individual disqualifying factors contained in § 533.6(b)(1) of this chapter. The Chairman shall promptly notify the tribe and management contractor if any findings preclude the Chairman from approving a management contract or a change in financial interest.

PART 539—APPEALS

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

§ 539.1 Scope of this part.

This part applies to appeals from the Chairman's decision to approve or disapprove a management contract under this chapter, except that appeals from the Chairman's decision to require modification of or to void a management contract subsequent to his or her initial approval are addressed elsewhere in this chapter.

§ 539.2 Appeals.

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

[FR Doc. 93–1064 Filed 1–21–93; 8:45 am]

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25 CFR Parts 571, 573, 575, 577

RIN 3141–AA02

Compliance and Enforcement Procedures Under the Indian Gaming Regulatory Act

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission is publishing regulations to implement the compliance and enforcement provisions of the Indian Gaming Regulatory Act of 1988. The rule establishes procedures for monitoring and investigations, enforcement, civil fines, and appeals to the Commission.

EFFECTIVE DATE: This rule becomes effective on February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Neil Stoloff at 202–632–7003 ext. 35, or by facsimile at 202–632–7066 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The Indian Gaming Regulatory Act (IGRA, or the Act), 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC, or the Commission). Under the IGRA, the Commission is charged with regulating class II gaming, and certain aspects of class III gaming.

On August 15, 1991, the Commission published a final rule (56 FR 40702) requiring class II gaming operations to compute and pay to the Commission the annual fees required by section 2717 of the Act. On April 9, 1992 (57 FR 12382), the Commission published a final rule that defines key statutory terms, notably clarifying the distinctions between class II gaming (regulated by tribes and the Commission) and class III gaming (regulated under negotiated tribal-state compacts).

On July 9, 1992 (57 FR 30584), the Commission proposed regulations to implement the Commission's authority to enforce federal and tribal gaming requirements. Those rules are being published in final form today. The Commission is publishing final rules separately regarding its review and approval of tribal gaming ordinances and resolutions under sections 2710 and 2712 of the Act, and its review and approval of management contracts under sections 2710(d)(9), 2711, and 2712 of the Act and 25 U.S.C. 81. The Commission published proposed rules regarding the Freedom of Information Act on November 24, 1992 (57 FR 55212). In the near future, the Commission will publish proposed rules regarding the National Environmental Policy Act and tribal self-regulation under section 2710(c) of the Act.

In the preamble to the proposed rule (57 FR 30584, July 9, 1992), the Commission provided a detailed discussion of the rule's provisions and invited the public to comment on both the basic approach of the regulations and any specific issues that commenters identified. Comments received and the Commission's responses to those comments are summarized below.

General Comments

One commenter asked that the Commission clarify the regulatory roles of the Commission, the states, and the tribes.

The IGRA classifies Indian gaming into class I, class II, and class III. Regulatory definitions of these terms can be found in 25 CFR part 502 (57 FR 12392, April 9, 1992). The tribes have exclusive jurisdiction over class I gaming. Class II gaming is regulated by the tribes and the Commission. Class III gaming is regulated by individual tribes and states under negotiated tribal-state compacts, with the Commission exercising a role that is limited mostly to its review, approval, and monitoring of management contracts and tribal ordinances related to gaming.

The Commission has added a new part 501, Purpose and Scope, that spells out the overlapping jurisdictions of a tribe, the Commission, and a state (when a tribal-state compact is in effect). Tribes may add their own requirements to Indian gaming so long as those requirements are consistent with and no less stringent than the IGRA, the Commission's regulations, or a compact for class III gaming.

A state official noted that class III tribal-state compacts may require that Indian gaming operations meet certain conditions, yet state officials have little authority on Indian lands to ensure that those conditions are met. According to this commenter, the Commission should address this situation directly in its rules because the Commission "may offer the only practical means of determining compliance with these compacts."

The Commission disagrees. Section 2710(d)(3)(C) of the IGRA authorizes a state to negotiate with a tribe over the allocation of criminal and civil jurisdiction over class III gaming on Indian lands, and to provide remedies in the compact for breach of contract. Section 2710(d)(7)(A) of the Act vests jurisdiction over compact disputes with the U.S. district courts.

One commenter suggested that the Commission establish "a formal mechanism whereby the Commission receives all notices of violations and complaints filed by the state or tribal regulatory bodies against Class II and III gaming establishments."

The Commission agrees that information relating to tribal and state enforcement of gaming requirements would help the Commission meet its responsibilities under the Act. These responsibilities include evaluating petitions for self-regulation, formulating an effective inspection scheme, and evaluating a respondent's history of violations under 25 CFR 575.4(c), among other things. Accordingly, the Commission has added a new paragraph (d) to § 571.7, which requires a gaming operation to maintain copies of all enforcement actions that the tribe or a state has taken against the operation, noting the final disposition of each case.

The same commenter questioned whether the regulations require class II and class III operations to submit "internal and accounting controls" to the Commission.

The Commission has elected not to require gaming operations to submit detailed descriptions of internal procedures. Under the IGRA, the tribe is the primary regulator of gaming on Indian lands, with the Commission playing an oversight role. As such, the tribes will ensure that adequate controls are in place to meet their obligations under the Act.

Part 571—Monitoring and Investigations

One commenter questioned whether under part 571, the Commission's representative would be authorized to take sworn statements from witnesses in class II and class III establishments.

The Commission does not intend to take sworn statements when conducting routine inspections. When sworn testimony is needed as part of a Commission investigation or other proceeding, the Commission will follow the procedures contained in § 571.11.

The same commenter suggested that part 571 should include a requirement that all records "be complete, accurate and legible and stored in some type of order."

The Commission believes that such a requirement is already embodied in § 571.7(a), which requires a gaming operation to keep records "sufficient to establish" information to which the Commission requires access.

This commenter also questioned whether part 571 as proposed would permit a class II operation to microfilm or fiche records, than destroy the originals.

Although it may be prudent to archive original records rather than destroy them, the Commission has not imposed such a requirement in these rules. An information storage system that provides information in a form that is retrievable and susceptible to audit should meet the requirements of § 571.7(a).

Definitions

Authorized Representative

One commenter suggested that the defined term *authorized representative* in proposed § 571.2 should be revised to read "Commission's authorized representative" to conform to usage elsewhere in the regulations (for example, §§ 571.5(a) and 571.6(a)).

The Commission agrees and has made this change.

Party

One commenter suggested that the definition of *party* in § 571.2 should be revised "to require that the tribe be a party to all proceedings initiated under the Act or regulations with respect to the tribe's gaming operation."

The Commission does not agree that a tribe should be required to be a party in all cases, but rather, that a tribe should have the right to participate as a party in proceedings involving a gaming operation located on lands over which the tribe has jurisdiction if the tribe is not already a named party. Accordingly, the Commission has inserted a new § 577.12(b) (regarding intervention) to provide a tribe with the unqualified right to intervene in cases where it is not already a named party.

Presiding Official

One commenter suggested that the definition of *presiding official* in § 571.2 should be revised to ensure that the presiding official will be "both objective and experienced in Indian gaming." Specifically, this commenter argued that the definition should spell out the criteria for determining whether a person is "qualified" to serve as a presiding official and to clarify whether the presiding official may be a member or employee of the Commission.

Another commenter, arguing along the same lines, suggested that the presiding official should be selected "in a manner that maintains his total independence of the influence of the Chairman." This commenter offered the following language to be added to the definition of "presiding official" in § 571.2: "The presiding official is to be appointed by the Secretary of the Interior from a list of available candidates previously prepared by the Secretary of the Interior and deemed by him to be independent of any influence from the Commission."

The Commission agrees with these commenters that the presiding official must be both objective and qualified. The Commission believes, however, that the definition of "presiding official" is adequate as proposed. Under that definition, the presiding official must be "qualified to conduct an administrative hearing" and must have "had no previous role in the prosecution of a matter over which he or she will preside." Beyond that, the Commission does not believe it is necessary to detail specific qualifications in the regulations. Any party may question the impartiality or other qualifications of a presiding official during a proceeding or in a subsequent court challenge.

The Commission does not agree, however, that experience in Indian gaming is a necessary qualification for presiding over an administrative hearing, or that a Commissioner or other employee of the Commission who otherwise meets the rule's definition of presiding official should be ineligible to serve in that capacity. It is the Commission that will decide appeals at the administrative level; the presiding official will assist the Commission by rendering a recommended decision. The Commission will rely on the presiding official to conduct a hearing in a manner that will provide due process to the parties and that will yield an administrative record on which a reviewing court can rely. The Commission believes that no additional requirements of "independence" are necessary.

Respondent

The Commission has revised the definition of respondent in § 571.2 to refer to a "person" rather than the owner or operator of a gaming operation. As discussed below, the Commission also added a new paragraph (b) to § 575.9 that requires civil fines to be paid by the person assessed; they may not be treated as an operating expense of a gaming operation. These changes ensure that innocent parties will not be penalized. Note that "person" is defined in § 571.2 to mean "an individual, Indian tribe, corporation, partnership, or other organization or entity."

Subpart B, Inspection of Books and Records

One commenter suggested that proposed subpart B should be revised to require that inspections "shall not be conducted in a manner that disrupts normal business operations unless the NIGC has probable cause to believe that the disruption is necessary in order to uncover violations of the IGRA or tribal laws or regulations within the jurisdiction of the NIGC."

The Commission intends to conduct inspections in a manner that does not unduly disrupt gaming operations. In general, the Commission intends to implement the IGRA and these regulations in a reasonable manner. It would be neither feasible nor meaningful, however, to attempt to spell out a standard of reasonableness throughout the regulations.

Access to Records

One commenter argued that § 571.6 should be revised to require that offsite records be identified to the Commission and that the Commission has the authority to inspect such records.

The Commission disagrees. Section 571.6(b), as proposed and as promulgated today, provides the Commission with adequate access to off-site records.

One commenter stated that § 571.6(b) should be revised to permit the inspection of off-site records at an agreed-upon time and place, rather than as "unilaterally dictated by the Commission's representative."

The Commission disagrees. Section 2706(b)(4) of the Act authorizes the Commission to "demand access to and inspect" all papers, books, and records. The Commission intends to implement this authority in a reasonable manner, but the Commission's access to records simply is not negotiable under the Act.

The same commenter suggested that the undefined terms "manager" and "employee" used in § 571.6 should be replaced by "primary management official." According to this commenter, the latter term is defined and, "more importantly, requests for access to records should be directed to one with access to the records and the authority to make them available."

The Commission agrees but does not believe that the primary management official is the only person who will be authorized to provide the Commission with access to records. The Commission has revised the regulations here and elsewhere to make the "gaming operation" the entity responsible for meeting regulatory requirements. It will be up to responsible officials of the operation to see that the operation meets the requirements of the Act and these regulations.

Record-keeping

One commenter stated that the Commission should provide more guidance regarding the required level of record-keeping. The commenter argued that, as proposed, § 571.7(b) would require a gaming operation to keep records of all paperwork on all transactions.

Section 571.7(a) requires records "sufficient to establish" the required information. The Commission does not believe that the extreme level of record-keeping described by the commenter is necessary to meet this regulatory standard.

One commenter suggested that proposed § 571.7(b) should be revised (apparently to be consistent with proposed paragraph (a)) to read: "The Commission may require a gaming operation *subject to regulation by the Commission* to submit statements, reports, * * *"

The Commission may impose regulatory requirements only upon a gaming operation that is "subject to regulation by the Commission." Therefore, the Commission has deleted this reference altogether from § 571.7.

Several commenters stated that the requirement of § 571.7(c) that a gaming operation maintain records for at least seven years is excessive. They recommended a shorter period, such as three years. Another commenter questioned whether it is reasonable to require in § 571.7(c) that records be maintained "for as long as their contents become material * * *" This commenter argued that, because an operator cannot know what records may become material, the Commission would be imposing a requirement for "perpetual storage."

The Commission proposed a minimum period of seven years for record-keeping because that is the longest period that a management contract may run under section 2711(b)(5) of the IGRA (and corresponding 25 CFR 531.1(h)); the Commission wanted to ensure that records would be maintained at least during the life of a management contract. Under that section of the Act, however, a management contract may run longer than five years only in extraordinary circumstances. Section 571.7(c), on the other hand, applies to all gaming operations. Therefore, the Commission has reduced the record-keeping period of § 571.7(c) from seven years to five. In addition, the Commission has deleted the reference to materiality, noting that gaming operations remain responsible under § 571.7(a), for maintaining records "sufficient to establish" the information required under the Act and these regulations.

Subpart C. Subpoenas and Depositions

One commenter suggested that § 571.8 should be revised to require that, before a deposition is taken, "reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition * * *", in conformance with section 2715(d) of the IGRA.

Section 571.8 relates to subpoenas of witnesses, whereas the cited statutory language concerns depositions. The IGRA's notice requirement for depositions is implemented in § 571.11(b), which the Commission has revised to clarify that notice of a proposed deposition must be provided to all parties.

The same commenter asked that § 571.8 (again, meaning § 571.11) be revised to specify procedures for depositions requested by a party in proceedings before the Commission.

Section 571.11(a) has been revised to clarify that a party wishing to depose a witness must file a request with the Commission (or the presiding official if one has been designated), that such a request will only be granted "for good cause shown," and that Commission staff may not be deposed (but may be directed to respond to interrogatories). Beyond these revisions, the Commission (or the presiding official under § 577.7(b)(4)) will establish the parameters of depositions on a case-by-case basis.

One commenter suggested that the Commission's authority under § 571.10 to require "(t)he attendance of witnesses and the production of books, papers, and documents * * * from any place in the United States at any designated place of hearing" should be qualified by the phrase "under reasonable circumstances."

As previously stated, the Commission intends to act reasonably. The commenter's suggested revision, however, would not add an enforceable standard. Note that under the Act and these regulations, witnesses are entitled to the same fees (including mileage) as are paid to witnesses in the courts of the United States.

One commenter asked that the Commission revise § 571.11(b) to provide that notice of each deposition must "be provided pursuant to part 519 to the tribal chairman, the designated tribal agent under proposed 25 CFR 519.1 and to the relevant tribal gaming authority, who shall have a right to be present at the deposition and to question the deponent."

Section 571.11(b) provides that notice of a proposed deposition is provided to the parties to a proceeding. A tribe would receive such notice if it is a party, either named or through intervention under § 577.12(b). Whether or not a party may question a deponent is within the discretion of the Commission or the presiding official when establishing the parameters of a deposition under § 577.7(b)(4).

The same commenter stated that, under § 571.11, the Commission should be required to notify a deponent of his or her right to be represented by legal counsel during the deposition.

The Commission agrees and has revised § 571.11(c) accordingly.

Subpart D, Audits

One commenter asked whether the Commission will conduct independent audits of gaming operations or simply receive copies of audits performed by state or tribal regulatory authorities, the minimum required by subpart D.

Under section 2706(b) of the Act, the Commission has the authority to conduct audits of Indian gaming operations, and will exercise that authority when necessary to carry out its duties under the Act. Subpart D implements the Act's requirement that tribes provide independent audits of their gaming operations to the Commission.

One commenter contended that the audit provisions of subpart D place "an unnecessary and expensive burden on Tribes who may already be complying with other federal audit requirements by preparing annual single audits."

The Commission has revised § 571.12 to clarify that audits under the IGRA may be conducted in conjunction with already existing tribal audits, as long as the requirements of these regulations are otherwise met.

One commenter stated that § 571.13 should be revised to provide that the annual audit report must be submitted to the Commission within 180 days after the end of a gaming operation's fiscal year, instead of the 120 days proposed.

The commenter provided no information to support his contention that the 120-day period is unreasonable.

The Commission believes that 120 days after the end of a gaming operation's fiscal year is sufficient time to conduct an audit and submit an audit report.

One commenter suggested that § 571.13 should be revised to provide an opportunity to seek an extension for filing audit results when, due to business complications or delay in the audit process, the audit results are not available within 120 days after the end of the fiscal year.

The Commission acknowledges that extraordinary circumstances could result in an extension of the 120-day requirement, but will deal with such situations on a case-by-case basis.

The Commission has revised § 571.13 to require that management letters be included with a tribe's audit report. This revision ensures that the Commission will be informed of problems identified and solutions recommended.

Part 573—Enforcement

In the preamble to the proposed rule (57 FR 30584, 30585 (July 9, 1992)), the Commission provided a flow chart that summarized the enforcement process. One commenter stated that part 573 should be revised to incorporate the statement at the beginning of the flow chart, which indicated that the Chairman or his or her representative, before issuing a notice of violation, will attempt to work with the tribe to ensure compliance and will oversee "on-the-spot" compliance when a violation is minor and readily correctable.

The statement to which the commenter referred represents the policy of the Commission. To transform this policy into a regulatory requirement, however, would be inconsistent with section 2713 of the IGRA, because it would limit the Chairman's ability to act immediately when necessary to enforce the Act. Nonetheless, as stated in the preamble to the proposed rule, "as a matter of policy the Commission will, whenever practicable, afford tribes the opportunity to address compliance problems in the first instance" (57 FR 30584 (July 9, 1992)).

Notices of Violation

One commenter asked that the Commission revise § 573.3 to incorporate the IGRA's provision (in section 2713(a)(3)) that a notice of violation "may not consist merely of allegations stated in statutory or regulatory language."

The Commission disagrees. Section 573.3(b)(2) requires that a notice of violation include a "description of the circumstances surrounding the violation, set forth in common and concise language." This provision ensures that the Commission will meet the IGRA's standard.

The same commenter suggested revising § 573.3(a) by deleting "owner or" and adding: "A copy of any notice of violation issued under the authority of this section shall be served on the chief executive officer of the tribe which is the owner of the facility."

The Commission disagrees. Part 519, Service, already provides for proper service of notice of violation, including the designation of an agent for service on a tribe. When a tribe is not the respondent, § 519.4 requires the Commission to transmit a copy of the notice to the tribe "as expeditiously as possible." The Commission believes that part 519 adequately addresses the commenter's concern.

One commenter argued that § 573.3(a) should be reconciled with § 519.4, "under which the Commission is required to send a copy of 'any official determination, order, or notice of violation to the appropriate tribal chairman, the designated tribal agent under § 519.1 and to the relevant tribal gaming authority'."

The Commission disagrees. Section 573.3(a) addresses the circumstances under which the Chairman may issue a notice of violation; part 519 describes the process for service or transmittal of the notice. The commenter identified no inconsistency between these provisions.

One commenter suggested adding a new subsection (c) to § 573.3: "Notwithstanding the provisions of subsections (a) and (b) of this section, no enforcement action will be taken by the Commission (sic) on any notice of violation on which the tribal owner is proceeding to take appropriate enforcement action under tribal law."

The commenter's proposed addition does reflect the Commission's regulatory approach. To incorporate it into the regulations, however, would be inconsistent with section 2713 of the IGRA because it could limit the Chairman's ability to take immediate action when necessary to enforce the Act. Therefore, the Commission has not adopted the suggested revision.

The Commission has revised § 573.3(a) to provide that the Chairman may issue a notice of violation to "any person." This revision reconciles § 573.3(a) with the Commission's revised definition of "respondent" in § 571.2 (discussed above).

Orders of Temporary Closure

One commenter stated that service of a closure order under § 573.6 should be reconciled with service provisions of part 519.

The Commission disagrees. Section 573.6 addresses the circumstances under which the Chairman may issue a closure order; part 519 describes the process for service or transmittal of the order. The commenter identified no inconsistency between these provisions.

Several commenters argued that the proposed compliance and enforcement regulations provide the Chairman with too much discretion to issue closure orders and assess civil fines. One commenter stated that "(m)any Indian tribes and Nations depend greatly upon the continued operation of their gaming facilities to generate funding for basic governmental services and essential services to their constituencies. Unilateral and discretionary closure absent valid and proper reason could inflict damages to the Tribe with potential administrative or injunctive relief arriving weeks later." This commenter asked that the Commission either impose a requirement that the Chairman "validate" an alleged offense prior to closure or civil fine assessment, or provide a reasonable time for an operator to correct a violation before the Chairman may impose closure or assess a civil fine.

The Commission disagrees. The regulations as proposed and as promulgated today implement the authority that the IGRA grants to the Chairman. Rather than providing the Chairman with too much discretion, these regulations define and limit the Chairman's discretion. For example, the IGRA authorizes the Chairman to issue an order of temporary closure when he or she finds "substantial" violations. The Act does not define the term "substantial," however. Section 573.6, on the other hand, lists all of the violations that the Commission deems substantial and thus may warrant closure. Moreover, any abuse of discretion by the Chairman is reviewable by both the Commission and the courts.

Similarly, another commenter complained that the rule as proposed would allow temporary closure to be effective "for up to 90 days before there has been a hearing as to whether a 'substantial violation' exists. By contrast, civil fines, which are not (as) punitive as closure, will not be levied until the tribe has exhausted its administrative appeal rights." This commenter suggested that 573.6 should be modified to provide that a closure order may take effect only "following a hearing that clearly establishes a 'substantial violation' has occurred" and only "in situations where corrective actions are (not) more appropriate."

The Commission disagees. Section 2713(b) of the IGRA provides for a hearing after the Chairman issues an order of temporary closure, not before. Section § 573.6(c) and part 577 implement that provision. If corrective action or some other action is more appropriate than closure in a given case, the Chairman will refrain from issuing an order of temporary closure.

The same commenter suggested that § 573.6 should be revised to provide that an order of temporary closure must be lifted automatically prior to the running of the appeal period "at any such earlier time that the tribe has voluntarily corrected the alleged substantial violation."

The Commission disagrees. The IGRA contains no such limitation on the Chairman's closure authority. Section 573.6(c)(3) does provide that the Chairman may rescind an order of temporary closure "for good cause." In addition, § 577.9(a) provides that the parties may negotiate a settlement "disposing of the whole or any part of (a) proceeding."

One commenter argued that the Chairman's authority under § 573.6(a) to order closure for violations of an approved tribal ordinance or resolution should be limited to cases where a tribe has requested such action of the Chairman.

The Commission disagrees. The Chairman's closure authority under section 2713(b) of the IGRA extends to violations of a tribal ordinance or resolution approved by the Chairman, whether or not a tribe has requested the Chairman's assistance.

Substantial Violations

This commenter and another contended that most of the "substantial" violations listed in § 573.6(a) (specifically, violations listed in subsections (2), (6), (8), (9), (10), (11), and (12)) should be subject to a requirement that a tribe first be given the opportunity to cure the alleged violation before the Chairman may order closure.

The Commission has revised § 573.6(a) to provide that an order of temporary closure must be issued "(s)imultaneously with or subsequently to" a notice of violation. Thus, notice and an opportuunity to correct a violation will have been provided in all but emergency situations. Note also that § 573.6(b) would permit the Chairman to issue an order of temporary closure that takes effect following an opportuntiy to correct.

One commenter suggested that § 573.6(a)(1) should be deleted because it would impermissibly transform insubstantial violations (that have not been corrected) into substantial violations that may result in closure.

The Commission disagrees. A violation that has been the subject of notice and an opportunity to correct, but remains uncorrected, is a substantial violation within the meaning of section 2713(b) of the IGRA.

One commenter asked that § 573.6(a)(2) be revised to require notice to a tribe before closure for failure to pay the annual fee, thus protecting against closures resulting from inadvertent failure to make payment.

The Commission does not agree that such a revision is necessary. An order of temporary closure is the last measure, not the first, that the Chairman will take in the face of nonpayment of fees. A tribe will always have ample notice of the violation and an opportunity to correct it before an order of temporary closure becomes a possibility.

One commenter stated that it would be "patently unfair for the Commission to issue an order for temporary closure under proposed § 573.6(a)(3) (regarding operating without an approved ordinance) and (7) (regarding operating without an approved management contract) until such time as the Commission commences its regulatory authority under the Act * * *." The commenter suggested that these sections should be revised to establish an effective date, until which the Secretary of the Interior would continue to exercise authority under section 2709 of the IGRA.

The Commission agrees that an otherwise valid gaming activity remains valid until the Chairman disapproves the relevant tribal ordinance or management contract. Section 573.6(a) (3) and (7) has been revised to cite parts 522, 523, and 533, the effect of which is that no violation occurs until after a tribe has had an opportunity to obtain the Chairman's approval of the tribe's ordinance or management contract.

The same commenter stated that background investigations often take more than 60 days to complete, necessitating "conditional employment and licensing pending completion of the background investigation." Therefore, this commenter suggested that § 573.6(a)(5) should be revised to provide that a gaming operation may operate for business "pending completion of the background investigation."

The Commission has revised § 573.6(a)(5) to provide that closure may occur if a gaming operation operates for business "without either background investigations having been completed for, or tribal licenses granted to, all key employees and primary management officials, as provided in § 558.3(b) * * *." Section 558.3(b) provides 60 days for a tribe to complete a background investigation and 90 days to issue a license, during which time the tribe may employ key employees and primary management officials. The Commission believes that this time is sufficient.

One commenter stated that § 573.6(a)(8) (authorizing closure for submitting false or misleading information to the Commission or a tribe) should be deleted because removal of the person who submitted false or misleading information to the Commission or the tribe would be more appropriate than closure.

The Commission agrees that removal or prosecution of the guilty person often will be more appropriate than closure. In those cases, closure will not occur. Still, because this is a substantial violation that may warrant closure in some cases, the Commission has not deleted the provision as suggested. The Commission has revised § 573.6(a)(8) to refer to "any person" rather than the owner, operator, or other agent of a gaming operation. The Chairman (subject to review by the Commission) will determine, on a case-by-case basis, whether closure is warranted.

Refusal of Entry

One commenter argued that § 573.6(a)(9) (authorizing closure for refusal of entry) should be deleted because "the proper forum for an Indian gaming operation or an employee thereof to challenge the constitutionality of the Commission's authority to conduct warrantless searches of a gaming operation is in the federal distict courts in the first instance, rather than through the appeals procedure contemplated in part 577 * * *." The commenter cited *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816 (1978) for the proposition that the Fourth Amendment's prohibition against unreasonable searches may require the Commission to obtain a search warrant before it may lawfully enter to inspect Indian gaming operations under the IGRA.

The Commission disagrees. The Supreme Court did hold in *Barlow's* that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property. In that case and others, however, the Court established a "pervasively regulated" standard under which no reasonable expectation of privacy exists for industries that have had a history of government oversight. Because gaming is a pervasively regulated industry, the Commission has the authority to conduct warrantless searches of Indian gaming operations (*see Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972); and *Colonnade Catering Corporation v. United States*, 397 U.S. 72, 74, 77 (1970)). Although a gaming operation may challenge a warrantless search in court, denial of entry remains a substantial violation under the IGRA. Therefore, the Commission has not deleted this provision as requested.

One commenter suggested that § 573.6(a)(9) should be revised to read: "(i) The chief executive officer of a tribe or a primary management official of a gaming operation refuses to allow an authorized representative of the Commission or an authorized tribal official to enter or inspect a gaming operation, in violation of § 571.5 or § 571.6 of this chapter; or (ii) a primary management official of a gaming operation refuses to allow an authorized tribal representative to enter or inspect the gaming operation, in violation of (a) a tribal ordinance or resolution approved by the Chairman under 25 U.S.C. 2710 or 2712."

The Commission has revised the language in this section and elsewhere to make the responsible entity "the gaming operation." It is up to the operation to see that responsible officials comply with the requirements of the Act and these regulations.

One commenter stated that the reference to the IGRA in § 573.6(a)(10) should be changed from 2711(e) to 2710(b)(2)(f)(ii)(II).

The Commission has revised this section to refer to the corresponding regulatory provisions, §§ 558.2 and 558.5.

One commenter argued that § 573.6(a)(11) (authorizing closure when a gaming operation operates class III games in the absence of a tribal-state compact) should be deleted because it reflects a criminal violation that is "more appropriately left to the U.S. Attorney in the District involved."

The Commission disagrees. Operating class III games in the absence of a compact may constitute a crime (for example, if gambling devices are involved). Nonetheless, such activity also would be a violation of section 2710(d) of the IGRA, which the Chairman is authorized to enforce. Nothing in the IGRA precludes parallel civil and criminal proceedings. Therefore, the Commission has retained this provision.

One commenter asked that § 573.6(a)(12) be revised to require that the Chairman give notice and an opportunity to correct or contest the allegation of a threat to the environment or the public health and safety before he or she issues a closure order.

The Commission disagrees. In such a situation immediate closure may be necessary to protect public health and safety or the environment.

One commenter suggested that § 573.6(b) should be revised to provide that a closure order will be effective immediately upon issuance only if "the Chairman finds that immediate closure is necessary to protect the tribe or the gaming public," and that an order of temporary closure will not take effect before a respondent has had an opportunity to seek expedited review under § 573.6(c). The commenter also stated that § 573.6(c) should be revised to grant respondents the right to seek a stay of a temporary closure order on an expedited basis.

The standard for immediate closure suggested by the commenter is implicit in section 2713(b) of the IGRA and in the rule itself; it need not be spelled out. The IGRA contemplates that immediate closure may occur in some cases. Accordingly, § 573.6(b) provides that an order of temporary closure may or may not take effect upon issuance (before an opportunity for expedited review), as the circumstances dictate. In addition, the expedited review provided under § 573.6(c) is informal. A respondent may ask the Chairman to lift a closure order in the course of that review.

One commenter suggested that the Commission define the term "working days" as used in proposed § 573.6(c) (regarding informal expedited review).

The Commission has changed the term "working days" in § 573.6(c) to "days," which is defined in § 571.2 to mean calendar days.

The same commenter suggested that § 573.6(c)(1) be revised to read, "The Chairman shall *complete* the expedited review * * *."

The Commission agrees and has made this revision. The Commission also has revised § 573.6 (b) and (c) to clarify that service of the closure order, rather than receipt of issuance, makes the order effective and triggers the right to informal expedited review under paragraph (c) and review by the Commission under part 577.

Part 575—Civil Fines

In the IGRA, the term "civil penalties" refers to both civil money penalties and orders of temporary closure. Part 575 addresses only civil fines. Therefore, the Commission has revised the term "penalties" to read "civil fines" in part 575.

One commenter stated that the Commission should revise part 575 to account for situations where a tribe has a "legitimate difference of opinion" regarding the requirements of the "complicated Indian Gaming Regulatory Act."

The Commission believes the regulations as proposed address the commenter's concerns. Respondents have numerous opportunities to lay out their differences with the Chairman regarding civil fine assessments (see, for example, §§ 575.5(a), 575.5(c), and 577.3(a)(2)).

Continuing Violations

One commenter stated that the Commission's treatment of "each daily illegal act or omission (as) a separate violation" is an "overly broad extension" of 25 U.S.C. 2713, which refers to a maximum $25,000 civil fine "per violation" (see §§ 575.3, 575.4(a)(2)).

The Commission disagrees. A "violation" may occur once or it may occur hundreds of times a day (for example, every time an illegal machine game is played). Rather than broadening the Chairman's authority, the rule limits the Chairman's civil fine assessment authority to a maximum daily amount.

Criteria for Civil Fine Assessment

One commenter stated that § 575.4 would improperly subject to civil fines a tribe that does not operate its gaming, contrary to section 2713(a) of the IGRA. This commenter suggested that this section be revised to read, "The Chairman may assess a penalty * * * *against the tribal operator of an Indian game or a management contractor engaged in gaming*, for each notice of violation * * *."

The Commission does not agree that section 2713(a) exempts from civil fines tribes that relay on management contractors. As used in section 2713(a), the term "tribal operator" means any tribe or individual that has a proprietary interest in gaming conducted on Indian lands. The Chairman intends to cite for a violation the person(s) who committed the violation, whether that person is a management contractor, a tribe, or an individual operator on Indian lands. The IGRA imposes numerous obligations on tribes (for example, to submit annual audit reports and obtain the Chairman's approval of tribal ordinances and management contracts), violations of which the Chairman is charged with enforcing. To interpret the IGRA as the commenter suggested would yield the absurd result that the Chairman would not be authorized to impose a civil fine for an uncorrected violation but would be authorized to close the operation under section 2713(b) (as implemented in § 573.6(a)(1)).

The Commission has revised § 575.4 to clarify that the Chairman may assess a civil fine "against a tribe, management contractor, or individual operating Indian gaming." In addition, a new paragraph (b) has been added to § 575.9, which provides that civil fines must be paid by the person assessed and may not be treated as an operating expense of the operation. This ensures that innocent parties will not be penalized.

One commenter stated that § 575.4(c)(1)–(3) should be simplified by providing that each violation that "becomes a final order of the Commission shall be considered whether or not it led to a civil penalty assessment."

The Commission has edited this language as suggested, but also to indicate that, to be considered in determining a respondent's history of violations, a final order of the Commission must not have been vacated. In addition, § 575.4(c)(1) has been modified to clarify that only violations cited by the Chairman must be the subject of a final order of the Commission. The Chairman also will consider other violations, such as those cited by a tribe (see the definition of "violation" in § 571.2).

One commenter suggested that § 575.4(e) (regarding good faith) should be revised to provide an exception "where the respondent exercises its appeal rights in good faith following a notice of violation." Otherwise, according to this commenter, "a tribe would be penalized whenever it disagrees with the Chairman's finding of a violation and decides to appeal a notice of a violation rather than to take the corrective action specified by the Chairman."

The Commission has deleted the word "adjust" in § 575.4(e) and replaced it with "reduce" to clarify that this criterion may only serve to reduce a civil fine. Bad faith actions by a respondent still would be addressed in § 575.4(d) (regarding willfulness). Note, however, that exercising one's right of appeal is not an indication of bad faith.

Civil Fine Assessment Procedures

One commenter stated that § 575.5(a) should be revised to provide an opportunity to request additional time to provide information about a violation to the Chairman.

The Commission agrees and has added after the word "violation" in the first sentence of § 575.5(a): "Or such longer period as the Chairman may grant for good cause".

The same commenter suggested that the phrase "when practicable" should be deleted from § 575.5(b) "to assure that all operators of games have an opportunity to comment on the proposed assessment."

The Commission disagrees. As used in § 575.5(b), the term "when practicable" refers to the time within which the Chairman will serve a proposed assessment, not whether the Chairman will serve the proposed assessment.

Settlement, Reduction, or Waiver of Civil Fine

One commenter suggested that § 575.6(a)(1) should be revised to provide that the Chairman may grant a request for a reduction or waiver of a proposed civil fine "within his or her discretion" (in line with language in proposed § 575.6(a)(3)).

The Commission has deleted this reference altogether as unnecessary. Section 2613(a) of the IGRA expressly provides that the Chairman's assessment of civil fines under the Act is discretionary.

Another commenter stated that § 575.6(a)(1) and 575.6(a)(3) should be reconciled so that the Chairman, whether granting or denying a request for a civil fine reduction or waiver, must "fully explain and document" the decision.

The Commission has deleted the cited language as unnecessary. The Chairman will fully document a decision on a request for a civil fine reduction or waiver. This need not be spelled out in the regulation. The Commission also has revised this section so that it follows a more logical sequence.

Part 577—Appeals Before the Commission

One commenter questioned whether the Administrative Procedure Act (APA) applies to proceedings under part 577.

The APA's adjudication provisions (5 U.S.C. 554, 556, and 557) only apply to administrative hearings that are conducted under a statute that specifically provides for hearings to be on the record (see 5 U.S.C.A. 554(a)). The IGRA does not; therefore, the APA's adjudication provisions do not apply to hearings provided under part 577.

One commenter suggested that part 577 should be revised to provide that, in an appeal from an order of temporary closure, "once an appeal has been filed, respondent may seek a stay from the presiding official, who shall grant the stay unless he specifically finds that the public interest requires immediate closure."

The Commission declines to delegate to the presiding official the authority to stay the Chairman's action before the Commission completes its review under part 577. A respondent may seek the equivalent of a stay from the Chairman under § 573.6(c) or § 577.9(a).

The same commenter suggested that part 577 should provide for "the negotiation of stays and their entry by consent order."

Section 577.9 provides for negotiation of an agreement "disposing of the whole or any part of the proceeding." The Commission believes that this provision would encompass a negotiated stay.

One commenter stated that part 577 should be revised to provide detailed hearing procedures, in particular to "set forth the role of the Chairman in post-closure hearings."

As noted above, hearings under part 577 are not subject to the adjudication provisions of the Administrative Procedure Act. Nevertheless, in today's final rule the Commission has provided additional hearing procedures in part 577. For example, under § 577.3, the respondent may ask to present oral testimony or witnesses, and may ask for a closed hearing. Under § 577.7, a respondent will always have the right, unless waived, to present an oral argument and to be represented by counsel in an appeal before the Commission. Unchanged from the proposed rule is the Commission's intention to vest discretion with the presiding official to conduct a hearing in a manner that will provide due process to the parties and that will yield an administrative record on which a reviewing court can rely. As for the Chairman's role in post-closure hearings, the IGRA provides that the Chairman is a member of the Commission and that the Commission hears an appeal from an order of temporary closure. In general, once an appeal is filed, the Chairman will be represented by Commission staff as a party to the proceeding.

Request for Hearing

One commenter stated that § 577.3(a) should be revised to provide that the 30-day appeal period commences with the "issuance" of a closure order (consistently with section 2713(b)(2) of IGRA), instead of upon service, as proposed.

The Commission disagrees. "Issuance" is not a defined term in the

IGRA; therefore, the suggested revision would not be meaningful. In any event, the Commission believes that issuance under the IGRA does not occur before an order is served. Note that part 519 provides for speedy service (for example, by facsimile).

The same commenter suggested that § 577.3(b) should be revised to require "only a notice of appeal sufficient to identify the order appealed from, followed at a later time by a prehearing brief detailing the reasons why the order appealed from is wrong."

The Commission agrees and has revised § 577.3(b) to provide that a notice of appeal need only reference the notice or order from which the appeal is taken. Under new paragraph (c) in § 577.3, within ten (10) days after filing a notice of appeal, the respondent will be required to file a supplemental statement. These revisions ensure that any potential for delay in meeting the IGRA's requirement (discussed below) for an expeditious hearing on an order of temporary closure will be within the control of the respondent.

Hearing Deadline

In the preamble to the proposed rule (57 FR 30584, 30587 (July 9, 1992)), the Commission discussed an apparent ambiguity in section 2713(b)(2) of the IGRA, which provides for a hearing before the Commission on an order of temporary closure. The issue was whether the right to request a hearing exists for 30 days from the date the order issues, or whether the hearing itself must be provided within that time. The Commission proposed a 30-day period for a tribe to request a hearing, and the Commission would be required to hold the hearing within 30 days after it receives a timely request.

Two commenters disputed the existence of any ambiguity. One of these commenters found "highly objectionable" the "unitary process" that the Commission proposed to use for appeals of all enforcement actions, "because it disregards the statutory time requirements for post-closure hearings."

The Commission disagrees. Section 577.4(b) distinguishes between hearings on orders of temporary closure and other hearings. Notwithstanding any other provision in part 577, and unless waived, the presiding official is required to provide a hearing on an order of temporary closure within 30 days after the Commission receives a timely notice of appeal. This provision ensures that the Commission will comply with the IGRA's requirements for post-closure hearings.

The ambiguity in section 2713(b)(2) of the IGRA is apparent from the fact that the provision does not impose any time by which a hearing must be requested. In contrast, 12 U.S.C. 1818(g)(3) entitles an official suspended by the Federal Deposit Insurance Corporation (FDIC) to request a hearing before the FDIC "(w)ithin thirty days from service of any notice of suspension * * *" and requires the FDIC to provide such a hearing "not more than thirty days after receipt of a request." The lack of similar specific language in section 2713(b)(2) of the IGRA leaves unanswered the question whether the right to request a hearing lasts 30 days or the hearing itself must be provided within that time. The Commission interprets the IGRA to mean that the right to a hearing lasts for 30 days. The result of accepting the commenters' interpretation of section 2713(b)(2) would be that a gaming operation that receives an order of temporary closure could request a hearing 30 days after the order issues, and the Commission would have to provide a hearing the same day.

Regarding the problem posed by this scenario, one commenter suggested that the Commission impose a short period (say, five days) within which a hearing must be requested, or include with the closure order itself a hearing date that meets the 30-day requirement of IGRA section 2713(b)(2).

As a practical matter, the Commission would not deny a request for a hearing filed within 30 days after a closure order issues. Furthermore, the Commission sees no value in scheduling a hearing that the respondent may decide not to request.

As discussed above, the Commission has revised § 577.3(b) to provide that a notice of appeal need only reference the notice or order from which the appeal is taken. Thus, a respondent could trigger the 30-day hearing deadline by filing a notice of appeal shortly after a closure order issues. Any potential for delay would be within the control of the respondent. Accordingly, the Commission has not revised § 577.4 as the commenters requested.

Service

One commenter suggested that § 577.6(a) be revised to provide that filings will be made with the presiding official only after the respondent receives notice that a presiding official has been designated.

The Commission agrees and has revised § 577.6(a) accordingly.

The same commenter stated that § 577.6(d) should be modified to read: "Whenever a representative (including an attorney) has entered an appearance for a party in a proceeding initiated under this part, service thereafter shall be made upon the representative."

The Commission agrees and has revised § 577.6(d) accordingly.

One commenter suggested that the Commission revise § 577.6(e) to clarify the term "other nonbusiness day."

The commission has deleted this term from § 577.6(e) as unnecessary.

One commenter stated that § 577.6(e) should be revised to track the language of Rule 6(a) of the Federal Rules of Civil Procedure (adding, "the day of the act, event or default from which the designated period of time begins to run shall not be included").

The Commission has revised § 577.6(e) to achieve the same result as the language that the commenter offered. The Commission also revised § 577.6(c) to provide that service is complete upon transmittal, making it consistent with part 519, Service.

Conduct of Hearing

One commenter argued that the word "genuine" should be deleted from the first sentence in proposed § 577.7(a) because it "raises more questions than it answers." Another commenter suggested that proposed § 577.10 be revised "to clarify that the presiding official may find that there is no genuine issue of material fact only upon motion by a party."

The Commission has deleted proposed § 577.10 altogether and has revised § 577.7 to provide the respondent, in all cases, with a right to present written evidence and to present oral argument. This approach is in line with the U.S. Supreme Court's holding in *FDIC v. Mallen*, 486 U.S. 230 (1988). In that case, the Supreme Court held that in post-suspension actions analogous to closure under the IGRA, due process requires, at a minimum, the opportunity to present oral argument. Other evidentiary procedures, such as the cross-examination of witnesses, are within the discretion of the regulatory agency. Beyond this revision, the Commission will rely on the presiding official to establish suitable hearing procedures.

The same commenter stated that § 577.7(b)(1) should be revised to make it mandatory that any person giving testimony do so under oath.

The Commission agrees and has accomplished this result by replacing the word "may" with "shall" in § 577.7(b).

Discovery

One commenter contended that the Commission should provide for "much broader discovery * * * in conformance with the minimum standards for discovery recommended by the Administrative Conference of the United States (ACUS). Administrative Conference Recommendation No. 21 (1970)."

The Commission disagrees. The ACUS Recommendation upon which the commenter relied is 22 years old and is based on an out-of-date version of the Federal Rules of Civil Procedure. More recently, in 1983 the Federal Rules were substantially amended to resolve problems arising from "duplicative, redundant, and excessive discovery." For example, rules 26(a)(1) and (b)(1) (General Provisions Governing Discovery) were amended to "encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices" (Fed. R. Civ. P. 26, annotation to 1983 Amendments). Moreover, the Administrative Procedure Act does not provide a right to discovery even for formal hearings conducted under its adjudication provisions.

The Commission believes that it has provided an appropriate standard for discovery in § 577.7(b)(4), which allows the presiding official to authorize exchanges of information among the parties when to do so would expedite the proceeding. The Commission has revised § 577.7(b)(4) to clarify that the taking of depositions and the submission of interrogatories are within the scope of prehearing exchanges of information that the presiding official may permit. Beyond that, the Commission will rely on the presiding official to provide for an appropriate level of discovery in each case. Any decision by a presiding official is subject to later review by the Commission or the courts.

Confidentiality

One commenter suggested that § 577.8 be revised by deleting or clarifying the limitation of its applicability to "proceedings involving more than two parties."

Section 577.8 is limited to proceedings involving more than two parties because, if only the Chairman and the respondent are parties, the Chairman is bound by the confidentiality provisions of § 571.3.

Regarding disclosure of confidential information, one commenter suggested that the Commission replace the language in § 577.8(b)(1), "within the context of the proceeding;" with "directly in connection with the hearing, before the presiding official."

The Commission has revised § 577.8(b)(1) to clarify that confidential information may only be used by a party "directly in connection with the hearing." The Commission does not agree, however, that such use must occur in the presence of the presiding official.

Intervention

One commenter stated that the presiding official should be given specific authority to proceed with a hearing "prior to the expiration of the time period specified in § 577.12 for the processing of the Petition for Intervention." The commenter expressed concern that, in the absence of such authority, "an independent third party might well cause the continuation of a Temporary Order of Closure for an extended period of time."

The Commission disagrees. Such authority already exists under § 577.4(b), which requires the presiding official to conclude a hearing on an order of temporary closure within 30 days, "(n)otwithstanding any other provision of this part."

One commenter argued that § 577.12(a) should be broader in providing for intervention by a tribe and narrower in providing for intervention by persons other than a tribe. The commenter suggested two additional criteria for § 577.12(a): "(4) Their claim or defense and respondent's appeal have a question of law or fact in common; and (5) Intervention would not unfairly prejudice existing parties or delay resolution of the proceedings."

The commenter did not explain why the first suggested addition would be helpful and the Commission saw no reason to adopt it. The Commission has adopted the commenter's second suggested addition in new paragraph (4) in § 577.12(a). The Commission also agrees that a tribe should have the right to intervene in any case that involves a gaming operation on lands over which the tribe has jurisdiction. Accordingly, the Commission has inserted a new paragraph (b) (and relettered the remaining paragraphs) in § 577.12 to read: "If a tribe has jurisdiction over lands on which there is a gaming operation that is the subject of a proceeding under this part, and the tribe is not already a named party, such tribe may intervene as a matter of right."

One commenter stated that § 577.12(a)(1) should be revised "to more closely follow the federal rule and to require that the proposed intervenor demonstrate that it claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest."

The Commission disagrees. The commenter offered no reason why the suggested language should be preferred, and the Commission found none.

The same commenter suggested that § 577.12(e) (now (f)) should be revised to track Rule 29 of the Federal Rules of Appellate Procedure, under which the decision whether to allow participation as amicus curiae would be left to the discretion of the presiding official.

The Commission agrees and has revised the last sentence in § 577.12(f) by replacing the second "shall" with "may."

Transcripts

Two commenters argued that § 577.13 should be revised to provide that the Commission will "employ a court reporter who will provide transcripts on a daily expedited basis, so that the transcript will be available on the day following conclusion of the hearing." Moreover, these commenters questioned whether there is any good reason why the presiding official's recommended decision must await receipt of the transcript.

Prompt procurement of transcripts will be handled administratively, and need not be addressed in the rule. The Commission agrees that the presiding official's recommended decision need not always await receipt of the transcript. A new paragraph (c) has been added to § 577.7 to provide that the hearing is concluded once the presiding official closes the record.

Recommended Decision

One commenter stated that § 577.14(a) should be revised to clarify that, in reaching a decision based on the "whole record" of a proceeding, the presiding official may consider matters determined to be confidential.

The Commission does not agree that any revision is necessary. Section 577.8(f) provides: "When a decision by a presiding official is based in whole or in part on evidence not included in the public record, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered shall be retained under seal as part of the official record." The Commission believes that this provision addresses the commenter's concern.

Review by Commission

One commenter argued that § 577.15 should be revised to address the apparent unfairness that results when the Chairman, as a member of the Commission, hears an appeal from an action of the Chairman.

The Commission disagrees. The IGRA vests the Chairman with dual authorities. The Commission has attempted to minimize the potential for conflict between these roles by providing for an objective trier of fact (the presiding official). Beyond that, the Chairman is obligated to perform the duties that the IGRA gives that person as Chairman and Commissioner. Note that it is not unusual for a Commission to initiate prosecutorial action, then hear an appeal from that action. This is not considered to be a violation of due process (see, for example, *Federal Trade Commission v. Standard Oil of Southern California*, 449 U.S. 232 (1980)).

In the proposed rule (57 FR 30584, 30593 (July 9, 1992)), the Commission provided that, in the absence of a majority vote by the Commission to affirm or reverse the recommended decision of the presiding official, the action of the Chairman that is the subject of the appeal would be deemed vacated. This approach stemmed from the IGRA's provision, in section 2713(b), requiring a vote of no fewer than two Commissioners to make an order of temporary closure permanent or to dissolve it. The Commission believes that an order of temporary closure should not be allowed to stand if at least two Commissioners fail to affirm it. In all other cases, however, the Commission believes that if the Commission fails to act on the recommended decision of the presiding official, the recommended decision should become the final decision of the Commission. Accordingly, the last sentence in § 577.15 has been revised to read: "In the absence of a majority vote by the Commission within the time provided by this section, the recommended decision of the presiding official shall be deemed affirmed *except that*, if the subject of the appeal is an order of temporary closure issued under § 573.6 of this chapter, the order of temporary closure shall be dissolved."

The Commission also made numerous minor editorial changes intended to correct typographical and stylistic errors contained in the proposed rule.

Regulatory Matters

Executive Order 12291 and the Regulatory Flexibility Act

The Commission has determined that this document is not a major rule under Executive Order 12291. The rule will not have any significant effects on the economy or result in major increases in costs or prices for consumers, individual industries, federal, state, or local governments, agencies, or geographical regions. The rule will not have any adverse effects on competition, employment, investment, productivity, innovation, or the export/import market.

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.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* They have been assigned clearance number 3141–0001, and are approved through July 31, 1995.

National Environmental Policy Act

The Commission has determined that this rulemaking 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.

Executive Order 12778

The Chairman of the National Indian Gaming Commission has certified to OMB that this rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778, "Civil Justice Reform," 56 FR 55195, October 25, 1991.

Anthony J. Hope,
Chairman, National Indian Gaming Commission.

List of Subjects

25 CFR Part 571

Gaming, Indian lands, Investigations, Reporting and recordkeeping requirements.

25 CFR Part 573

Administrative practice and procedure, Gaming, Indian lands.

25 CFR Part 575

Administrative practice and procedure, Gaming, Indian lands, Penalties.

25 CFR Part 577

Administrative practice and procedure.

Title 25, Chapter III of the Code of Federal Regulations is amended by adding new parts 571, 573, 575, and 577 to read as follows:

PART 571—MONITORING AND INVESTIGATIONS

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

Subpart A—General

§ 571.1 Scope.

This part sets forth general procedures governing Commission monitoring and investigations of Indian gaming operations.

§ 571.2 Definitions.

As used in this chapter, the following terms have the specified meanings:

Commission's authorized representative means any persons who is authorized to act on behalf of the Commission for the purpose of implementing the Act and this chapter.

Day means calendar day unless otherwise specified.

Hearing means that part of a proceeding that involves the submission of evidence to the presiding official, either by oral presentation or written submission.

Party means the Chairman, the respondent(s), and any other person named or admitted as a party to a proceeding.

Person means an individual, Indian tribe, corporation, partnership, or other organization or entity.

Presiding official means a person designated by the Commission who is qualified to conduct an administrative hearing and authorized to administer oaths, and has had no previous role in the prosecution of a matter over which he or she will preside.

Resondent means a person against whom the Commission is seeking civil penalties under section 2713 of the Act.

Violation means a violation of applicable federal or tribal statutes, regulations, ordinances, or resolutions.

§ 571.3 Confidentiality.

Unless confidentiality is waived, the Commission shall treat as confidential any and all information received under the Act that falls within the exemptions of 5 U.S.C. 552(b) (4) and (7); *except* that when such information indicates a violation of Federal, State, or tribal statutes, regulations, ordinances, or resolutions, the Commission shall provide such information to appropriate law enforcement officials. The confidentiality of documents submitted in a multiple-party proceeding under part 577 of this chapter is addressed in § 577.8 of this chapter.

Subpart B—Inspection of Books and Records

§ 571.5 Entry of premises.

(a) The Commission's authorized representative may enter the premises of an Indian gaming operation to inspect, examine, photocopy, and audit all papers, books, and records (including computer records) concerning:

(1) Gross revenues of class II gaming conducted on Indian lands; and

(2) Any other matters necessary to carry out the duties of the Commission under the Act and this chapter.

(b) The Commission's authorized representative shall present official identification upon entering a gaming operation for the purpose of enforcing the Act.

§ 571.6 Access to papers, books, and records.

(a) Once the Commission's authorized representative presents proper identification, a gaming operation shall provide the authorized representative with access to all papers, books, and records (including computer records) concerning class II gaming or any other matters for which the Commission requires such access to carry out its duties under the Act.

(b) If such papers, books, and records are not available at the location of the gaming operation, the gaming operation shall make them available at a time and place convenient to the Commission's authorized representative.

(c) Upon the request of the Commission's authorized representative, the gaming operation shall photocopy, or allow the Commission's authorized representative to photocopy, any papers, books, and records that are requested by the Commission's authorized representative.

§ 571.7 Maintenance and preservation of papers and records.

(a) A gaming operation shall keep permanent books of account or records, including inventory records of gaming supplies, sufficient to establish the amount of gross and net income, deductions and expenses, receipts and disbursements, and other information required in any financial statement, report, or other accounting prepared pursuant to the Act or this chapter.

(b) The Commission may require a gaming operation to submit statements, reports, or accountings, or keep specific records, that will enable the Commission to determine whether or not such operation:

(1) Is liable for fees payable to the Commission and in what amount; and

(2) Has properly and completely accounted for all transactions and other matters monitored by the Commission.

(c) Books or records required by this section shall be kept at all times available for inspection by the Commission's authorized representatives. They shall be retained for no less than five (5) years.

(d) A gaming operation shall maintain copies of all enforcement actions that a tribe or a state has taken against the operation, noting the final disposition of each case.

Subpart C—Subpoenas and Depositions

§ 571.8 Subpoena of witnesses.

By majority vote the Commission may authorize the Chairman to require by subpoena the attendance and testimony of witnesses relating to any matter under consideration or investigation by the Commission. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

§ 571.9 Subpoena of documents and other items.

By majority vote the Commission may authorize the Chairman to require by subpoena the production of certain documents and other items that are material and relevant to facts in issue in any matter under consideration or investigation by the Commission.

§ 571.10 Geographical location.

The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing.

§ 571.11 Depositions.

(a) Any party wishing to depose a witness shall file a request with the Commission or, if a presiding official has been designated under part 577 of this chapter, to the presiding official. Such a request shall not be granted except for good cause shown. A Commissioner or a presiding official may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation, except that Commission personnel may not be questioned by deposition for the purposes of discovery, but may be questioned by written interrogatories as authorized by the Commission or a presiding official. Commission records are not subject to discovery under this chapter. The inspection of Commission records is governed by § 571.3 of this part and the Freedom of Information Act, 5 U.S.C. 552. Depositions under this section may be taken before any person designated by the Commission or a presiding official, and who has the power to administer oaths.

(b) A party or a Commissioner (or a person designated by a Commissioner under paragraph (a) of this section) proposing to take a deposition under this section shall give reasonable notice to the Commission and the parties, if any, of the taking of a deposition. Notice shall include the name of the witness and the time and place of the deposition.

(c) Every person deposed under this part shall be notified of his or her right to be represented by counsel during the deposition, and shall be required to swear or affirm to testify to the whole truth. Testimony shall be reduced to writing and subscribed by the deponent. Depositions shall be filed promptly with the Commission or, if a presiding official has been designated, with the presiding official.

(d) Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall be severally entitled to the same fees as are paid for like services in the courts of the United States.

Subpart D—Audits

§ 571.12 Audit standards.

A tribe shall engage an independent certified public accountant to provide an annual audit of the financial statements of each gaming operation on Indian lands. Such financial statements shall be prepared in accordance with generally accepted accounting principles and the audit(s) shall be conducted in accordance with generally accepted auditing standards. Audit(s) of the gaming operation required under this section may be conducted in conjunction with any other independent audit of the tribe, provided that the requirements of this chapter are met.

§ 571.13 Copies of audit reports.

A tribe shall submit to the Commission a copy of the report(s) and management letter(s) setting forth the results of each annual audit within 120 days after the end of each fiscal year of the gaming operation.

§ 571.14 Relationship of audited financial statements to fee assessment reports.

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

PART 573—ENFORCEMENT

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

§ 573.1 Scope.

This part sets forth general rules governing the Commission's enforcement of the Act, this chapter, and tribal ordinances and resolutions approved by the Chairman under part 522 or 523 of this chapter. Civil fines in connection with notice of violation issued under this part are addressed in part 575 of this chapter.

§ 573.3 Notice of violation.

(a) The Chairman may issue a notice of violation to any person for violations of any provision of the Act or this chapter, or of any tribal ordinance or resolution approved by the Chairman under part 522 or 523 of this chapter.

(d) A notice of violation shall contain:

(1) A citation to the federal or tribal requirement that has been or is being violated;

(2) A description of the circumstances surrounding the violation, set forth in common and concise language;

(3) Measures required to correct the violation;

(4) A reasonable time for correction, if the respondent cannot take measures to correct the violation immediately; and

(5) Notice of rights of appeal.

§ 573.6 Order of temporary closure.

(a) *When an order of temporary closure may issue.* Simultaneously with or subsequently to the issuance of a notice of violation under § 573.3 of this part, the Chairman may issue an order of temporary closure of all or part of an Indian gaming operation if one or more of the following substantial violations are present:

(1) The respondent fails to correct violations within:

(i) The time permitted in a notice of violation; or

(ii) A reasonable time after a tribe provides notice of a violation.

(2) A gaming operation fails to pay the annual fee required by 25 CFR part 514.

(3) A gaming operation operates for business without a tribal ordinance or resolution that the Chairman has approved under part 522 or 523 of this chapter.

(4) A gaming operation operates for business without a license from a tribe, in violation of part 558 of this chapter.

(5) A gaming operation operates for business without either background investigations having been completed for, or tribal licenses granted to, all key employees and primary management officials, as provided in § 558.3(b) of this chapter.

(6) There is clear and convincing evidence that a gaming operation defrauds a tribe or a customer.

(7) A management contractor operates for business without a contract that the Chairman has approved under part 533 of this chapter.

(8) Any person knowingly submits false or misleading information to the Commission or a tribe in response to any provision of the Act, this chapter, or a tribal ordinance or resolution that the Chairman has approved under part 522 or 523 of this chapter.

(9) A gaming operation refuses to allow an authorized representative of the Commission or an authorized tribal official to enter or inspect a gaming operation, in violation of § 571.5 or § 571.6 of this chapter, or of a tribal ordinance or resolution approved by the Chairman under part 522 or 523 of this chapter.

(10) A tribe fails to suspend a license upon notification by the Commission that a primary management official or key employee does not meet the standards for employment contained in § 558.2 of this chapter, in violation of § 558.5 of this chapter.

(11) A gaming operation operates class III games in the absence of a tribal-state compact that is in effect, in violation of 25 U.S.C. 2710(d).

(12) A gaming operation's facility is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety, in violation of a tribal ordinance or resolution approved by the Chairman under part 522 or 523 of this chapter.

(b) *Order effective upon service.* The operator of an Indian gaming operation shall close the operation upon service of an order of temporary closure, unless the order provides otherwise.

(c) *Informal expedited review.* Within seven (7) days after service of an order of temporary closure, the respondent may request, orally or in writing, informal expedited review by the Chairman.

(1) The Chairman shall complete the expedited review provided for by this paragraph within two (2) days after his or her receipt of a timely request.

(2) The Chairman shall, within two (2) days after the expedited review provided for by this paragraph:

(i) Decide whether to continue an order of temporary closure; and

(ii) Provide the respondent with an explanation of the basis for the decision.

(3) Whether or not a respondent seeks informal expedited review under this paragraph, within thirty (30) days after the Chairman serves an order of temporary closure the respondent may appeal the order to the Commission under part 577 of this chapter. Otherwise, the order shall remain in effect unless rescinded by the Chairman for good cause.

PART 575—CIVIL FINES

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

§ 575.1 Scope.

This part addresses the assessment of civil fines under section 2713(a) of the Act with respect to notices of violation issued under § 573.3 of this chapter.

§ 575.3 How assessments are made.

The Chairman shall review each notice of violation and order of temporary closure in accordance with § 575.4 of this part to determine whether a civil fine will be assessed, the amount of the fine, and, in the case of continuing violations, whether each daily illegal act or omission will be deemed a separate violation for purposes of the total civil fine assessed.

§ 575.4 When civil fine will be assessed.

The Chairman may assess a civil fine, not to exceed $25,000 per violation, against a tribe, management contractor, or individual operating Indian gaming for each notice of violation issued under § 573.3 of this chapter after considering the following factors:

(a) *Economic benefit of noncompliance.* The Chairman shall consider the extent to which the respondent obtained an economic benefit from the noncompliance that gave rise to a notice of violation, as well as the likelihood of escaping detection.

(1) The Chairman may consider the documented benefits derived from the noncompliance, or may rely on reasonable assumptions regarding such benefits.

(2) If noncompliance continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation.

(b) *Seriousness of the violation.* The Chairman may adjust the amount of a civil fine to reflect the seriousness of the violation. In doing so, the Chairman shall consider the extent to which the violation threatens the integrity of Indian gaming.

(c) *History of violations.* The Chairman may adjust a civil fine by an amount that reflects the respondent's history of violations over the preceding five (5) years.

(1) A violation cited by the Chairman shall not be considered unless the associated notice of violation is the subject of a final order of the Commission and has not been vacated; and

(2) Each violation shall be considered whether or not it led to a civil fine.

(d) *Negligence or willfulness.* The Chairman may adjust the amount of a civil fine based on the degree of fault of the respondent in causing or failing to correct the violation, either through act or omission.

(e) *Good faith.* The Chairman may reduce the amount of a civil fine based on the degree of good faith of the respondent in attempting to achieve rapid compliance after notification of the violation.

§ 575.5 Procedures for assessment of civil fines.

(a) Within 15 days after service of a notice of violation, or such longer period as the Chairman may grant for good cause, the respondent may submit written information about the violation to the Chairman. The Chairman shall consider any information so submitted in determining the facts surrounding the violation and the amount of the civil fine.

(b) The Chairman shall serve a copy of the proposed assessment on the respondent within thirty (30) days after the notice of violation was issued, when practicable.

(c) The Chairman may review and reassess any civil fine if necessary to consider facts that were not reasonably available on the date of issuance of the proposed assessment.

§ 575.6 Settlement, reduction, or waiver of civil fine.

(a) *Reduction or waiver.* (1) Upon written request of a respondent received at any time prior to the filing of a notice of appeal under part 577 of this chapter, the Chairman may reduce or waive a civil fine if he or she determines that, taking into account exceptional factors present in a particular case, the fine is demonstrably unjust.

(2) All petitions for reduction or waiver shall contain:

(i) A detailed description of the violation that is the subject of the fine;

(ii) A detailed recitation of the facts that support a finding that the fine is demonstrably unjust, accompanied by underlying documentation, if any; and

(iii) A declaration, signed and dated by the respondent and his or her counsel or representative, if any, as follows: Under penalty of perjury, I declare that, to the best of my knowledge and belief, the representations made in this petition are true and correct.

(3) The Chairman shall serve the respondent with written notice of his or her determination under paragraph (a) of this section, including a statement of the grounds for the Chairman's decision.

(b) *Settlement.* At any time prior to the filing of a notice of appeal under part 577 of this chapter, the Chairman and the respondent may agree to settle an enforcement action, including the amount of the associated civil fine. In the event a settlement is reached, a settlement agreement shall be prepared and executed by the Chairman and the respondent. If a settlement agreement is executed, the respondent shall be deemed to have waived all rights to further review of the violation or civil fine in question, except as otherwise provided expressly in the settlement agreement. In the absence of a settlement of the issues under this paragraph, the respondent may contest the assessed civil fine before the Commission in accordance with part 577 of this chapter.

§ 575.9 Final assessment.

(a) If the respondent fails to request a hearing as provided in part 577 of this chapter, the proposed civil fine assessment shall become a final order of the Commission.

(b) Civil fines assessed under this part shall be paid by the person assessed and shall not be treated as an operating expense of the operation.

(c) The Commission shall transfer civil fines paid under this chapter to the U.S. Treasury.

PART 577—APPEALS BEFORE THE COMMISSION

Authority: 25 U.S.C. 2706, 2713, 2715.

§ 577.1 Scope.

(a) This part provides procedures for appeals to the Commission regarding:

(1) A violation alleged in a notice of violation;

(2) Civil fines assessed by the Chairman;

(3) Whether an order of temporary closure issued by the Chairman should be made permanent or be dissolved; and

(4) The Chairman's decision to void or modify a management contract under part 535 of this chapter subsequent to initial approval.

(b) Appeals from determinations of the Chairman under 25 U.S.C. 2710 and 2711 (regarding management contracts) and 2710 (regarding tribal gaming ordinances) are addressed in parts 539 and 524 of this chapter respectively.

§ 577.3 Request for hearing.

(a) A respondent may request a hearing to contest the matters listed in § 577.1(a)(1)–(4) by submitting a notice of appeal to the Commission within thirty (30) days after service of:

(1) A notice of violation;

(2) A proposed civil fine assessment or reassessment;

(3) An order of temporary closure; or

(4) An order voiding or modifying a management contract subsequent to initial approval.

(b) A notice of appeal shall reference the notice or order from which the appeal is taken.

(c) Within ten (10) days after filing a notice of appeal, the respondent shall file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefor and that includes, when available, supporting evidence in the form of affidavits. If the respondent wishes to present oral testimony or witnesses at the hearing, the respondent shall include a request to do so with the supplemental statement. The request to present oral testimony or witnesses shall specify the names of proposed witnesses and the general nature of their expected testimony, and whether a closed hearing is requested and why. The respondent may waive in writing his or her right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

§ 577.4 Hearing deadline.

(a) The Commission shall designate a presiding official who shall commence a hearing within 30 days after the Commission receives a timely notice of appeal from the respondent. At the request of the respondent, the presiding official may order the hearing to commence at a time more than 30 days after the respondent files a notice of appeal. The Commission shall transmit the administrative record of the case to the presiding official upon designation.

(b) If the subject of an appeal is whether an order of temporary closure should be made permanent or be dissolved, the hearing shall be concluded within 30 days after the Commission receives a timely notice of appeal, unless the respondent waives this requirement. Notwithstanding any other provision of this part, the presiding official shall conduct such a hearing in a manner that will enable him or her to conclude the hearing within the period required by this paragraph, while ensuring due process to all parties.

§ 577.6 Service.

(a) A respondent who initiates an appeal under this part shall serve copies of the initiating documents on the Commission at the address indicated in the notice or order that is the subject of the appeal. All filings shall be made with the Commission until a presiding official is designated and the parties are so notified, after which all filings shall be made with the presiding official. Any party or other person who subsequently files any other document with the Commission or the presiding officer shall simultaneously serve copies of that document on any other parties to the proceeding, except to that extent § 577.8 of this part may govern the disclosure of confidential information contained in a filing.

(b) Copies of documents by which a proceeding is initiated shall be served on all known parties personally, by facsimile, or by registered or certified mail, return receipt requested. All subsequent documents shall be served personally, by facsimile, or by first class mail.

(c) Service of copies of all documents is complete at the time of personal service or, if service is made by mail or facsimile, upon transmittal.

(d) Whenever a representative (including an attorney) has entered an appearance for a party in a proceeding initiated under this part, service thereafter shall be made upon the representative.

(e) In computing any period of time prescribed for filing and serving a document, the first day of the period so computed shall not be included. The last day shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which case the period shall run until the end of the next business day.

(f)(1) The presiding official may extend the time for filing or serving any document except a notice of appeal.

(2) A request for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the presiding official may grant an extension of time on his or her own initiative.

§ 577.7 Conduct of hearing.

(a) Once designated by the Commission, the presiding official shall set the case for hearing. The respondent may appear at the hearing personally, through counsel, or personally with counsel. The respondent shall have the right to introduce relevant written materials and to present an oral argument. At the discretion of the presiding official, a hearing under this section may include an opportunity to submit oral and documentary evidence and cross-examine witnesses.

(b) When holding a hearing under this part, the presiding official shall:

(1) Administer oaths and affirmations;

(2) Issue subpoenas authorized by the Commission;

(3) Rule on offers of proof and receive relevant evidence;

(4) Authorize exchanges of information (including depositions and interrogatories in accordance with 25 CFR part 571, subpart C) among the parties when to do so would expedite the proceeding;

(5) Regulate the course of the hearing;

(6) When appropriate, hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) At any conference held pursuant to paragraph (b)(6) of this section, require the attendance of at least one representative of each party who has authority to negotiate the resolution of issues in controversy;

(8) Dispose of procedural requests or similar matters;

(9) Recommend decisions in accordance with § 577.14 of this part; and

(10) Take other actions authorized by the Commission consistent with this part.

(c) The presiding official may order the record to be kept open for a reasonable period following the hearing (normally five days), during which time the parties may make additional submissions to the record. Thereafter, the record shall be closed and the hearing shall be deemed concluded. Within 30 days after the record closes, the presiding official shall issue a recommended decision in accordance with § 577.14 of this part.

§ 577.8 Request to limit disclosure of confidential information.

(a) If any person submitting a document in a proceeding that involves more than two parties claims that some or all of the information contained in that document is exempt from the mandatory public disclosure requirements under the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905 (disclosure of confidential information), or is otherwise exempt by law from public disclosure, the person shall:

(1) Indicate that the document in its entirety is exempt from disclosure or identify and segregate information within the document that is exempt from disclosure; and

(2) Request that the presiding official not disclose such information to the parties to the proceeding (other than the Chairman, whose actions regarding the disclosure of confidential information are governed by § 571.3 of this chapter) except pursuant to paragraph (b) of this section, and shall serve the request upon the parties to the proceeding. The request to the presiding official shall include:

(i) A copy of the document, group of documents, or segregable portions of the documents marked "Confidential Treatment Requested"; and

(ii) A statement explaining why the information is confidential.

(b) A party to a proceeding may request that the presiding official direct a person submitting information under paragraph (a) of this section to provide that information to the party. The presiding official shall so direct if the party requesting the information agrees under oath and in writing:

(1) Not to use or disclose the information except directly in connection with the hearing; and

(2) To return all copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

(c) If a person submitting documents in a proceeding under this part does not claim confidentiality under paragraph (a) of this section, the presiding official may assume that there is no objection to disclosure of the document in its entirety.

(d) If the presiding official determines that confidential treatment is not warranted with respect to all or any part of the information in question, the presiding official shall so inform all parties by telephone, if possible, and by facsimile or express mail letter directed to the parties' last known addresses. The person requesting confidential treatment then shall be given an opportunity to withdraw the document before it is considered by the presiding official, or to disclose the information voluntarily to all parties.

(e) If the presiding official determines that confidential treatment is warranted, the presiding official shall so inform all parties by facsimile or express mail directed to the parties' last known address.

(f) When a decision by a presiding official is based in whole or in part on evidence not included in the public record, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered shall be retained under seal as part of the official record.

§ 577.9 Consent order or settlement.

(a) *General.* At any time after the commencement of a proceeding, but at least five (5) days before the date set for hearing under § 577.7 of this part, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding.

(b) *Content.* Any agreement containing consent findings and an order disposing of the whole or any part of a proceeding shall also provide:

(1) A waiver of any further procedural steps before the Commission;

(2) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(3) That the presiding official's certification of the findings and agreement shall constitute dismissal of the appeal and final agency action.

(c) *Submission.* Before the expiration of the time granted for negotiations, the parties or their authorized representatives may:

(1) Submit to the presiding official a proposed agreement containing consent findings and an order;

(2) Notify the presiding official that the parties have reached a full settlement and have agreed to dismissal of the action, subject to compliance with the terms of the settlement; or

(3) Inform the presiding official that agreement cannot be reached.

(d) *Disposition.* In the event a settlement agreement containing consent findings and an order is submitted within the time granted, the presiding official shall certify such findings and agreement within thirty (30) days after his or her receipt of the submission. Such certification shall constitute dismissal of the appeal and final agency action.

§ 577.12 Intervention.

(a) Persons other than the respondent may be permitted to participate as parties if the presiding official finds that:

(1) The final decision could directly and adversely affect them or the class they represent;

(2) They may contribute materially to the disposition of the proceedings;

(3) Their interest is not adequately represented by existing parties; and

(4) Intervention would not unfairly prejudice existing parties or delay resolution of the proceeding.

(b) If a tribe has jurisdiction over lands on which there is a gaming operation that is the subject of a proceeding under this part, and the tribe is not already a named party, such tribe may intervene as a matter of right.

(c) A person not named as a party and who wishes to participate as a party under this section shall submit a petition to the presiding official within ten (10) days after the person knew or should have known about the proceeding. The petition shall be filed with the presiding official and served on each person who has been made a part at the time of filing. The petition shall state concisely:

(1) Petitioner's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for petitioner;

(4) The issues on which petitioner wishes to participate; and

(5) Whether petitioner wishes to present witnesses.

(d) Objections to the petition may be filed by any party within ten (10) days after service of the petition.

(e) When petitions to participate as parties are made by individuals or groups with common interests, the presiding official may request all such petitioners to designate a single representative, or he or she may recognize one or more petitioners.

(f) The presiding official shall give each petitioner, as well as the parties, written notice of the presiding official's decision on the petition. For each petition granted, the presiding official shall provide a brief statement of the basis of the decision. If the petition is denied, the presiding official shall briefly state the grounds for denial and may then treat the petition as a request for participation as amicus curiae (that is, "friend of the court").

§ 577.13 Transcript of hearing.

Hearings under this part that involve oral presentations shall be recorded verbatim and transcripts thereof shall be provided to parties upon request. Fees for transcripts shall be at the actual cost of duplication.

§ 577.14 Recommended decision of presiding official.

(a) *Recommended decision.* Within thirty (30) days after the record closes, the presiding official shall render his or her recommended decision. The recommended decision of the presiding official shall be based upon the whole record and shall include findings of fact and conclusions of law upon each material issue of fact or law presented on the record.

(b) *Filing of objections.* Within ten (10) days after the date of service of the presiding official's recommended decision, the parties may file with the Commission objections to any aspect of the decision, and the reasons therefor.

§ 577.15 Review by Commission.

The Commission shall affirm or reverse, in whole or in part, the recommended decision of the presiding official by a majority vote within thirty (30) days after the date on which the presiding official issued the decision. The Commission shall provide a notice and order to all parties stating the reasons for its action. In the absence of a majority vote by the Commission within the time provided by this section, the recommended decision of the presiding official shall be deemed affirmed except that, if the subject of the appeal is an order of temporary closure issued under § 573.6 of this chapter, the order of temporary closure shall be dissolved.

[FR Doc. 93-1065 Filed 1-21-93, 8:45 am]

BILLING CODE 7565-01

federal register

Friday
January 22, 1993

Part III

Department of Transportation

Research and Special Programs Administration

49 CFR Parts 172 and 177

Training for Safe Transportation of Hazardous Materials; Revisions and Response to Petitions for Reconsideration; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 172 and 177

[Docket No. HM-126F; Amdt. No. 172-126, 177-79]

RIN 2137-AB26

Training for Safe Transportation of Hazardous Materials; Revisions and Response to Petitions for Reconsideration

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; revisions and response to petitions for reconsideration.

SUMMARY: This rule revises a final rule published in the **Federal Register** on May 15, 1992 (57 FR 20944), which revised the Hazardous Materials Regulations to require training for hazardous materials (hazmat) employees. RSPA is delaying the compliance dates for training, primarily in response to petitions for reconsideration, and making editorial and technical corrections to the final rule.

EFFECTIVE DATE: February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Jackie Smith, Office of Hazardous Materials Standards, RSPA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001, Telephone: (202) 366-4488.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 1992, the Research and Special Programs Administration (RSPA) published a final rule under Docket HM-126F entitled, "Training for Safe Transportation of Hazardous Materials" (57 FR 20944) to enhance the training requirements for persons involved in the transportation of hazardous materials. This action was necessary to comply with the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) mandating that DOT regulate, under the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180), the training of all hazardous materials (hazmat) employees. Based on information provided to RSPA through its hazardous materials incident reporting system, human error is the probable cause of most transportation incidents and associated consequences involving the release of hazardous materials. Training of hazmat employees is aimed at reducing the number and severity of hazardous materials incidents.

Subsequent to issuance of that final rule, RSPA received six petitions for reconsideration and two comments in support of petitions submitted by other parties. In this document, RSPA is revising the final rule based on the merits of these petitions. Also, RSPA is making other minor revisions to correct, clarify and simplify certain provisions of the final rule.

Petitions Granted

RSPA received petitions requesting an extension of the compliance dates. RSPA had specified an April 1, 1993 compliance date for current employees (employed on or before November 15, 1992), and a compliance date for new employees (hired after November 15, 1992) of within 90 days of employment for completion of training. Petitioners requested that the April 1, 1993 compliance date be extended to October 1, 1993, to coincide with a compliance date for new hazard communication and classification requirements implemented under Docket HM-181, "Performance-oriented Packaging Standards" (55 FR 52402, 56 FR 66124, *et al.*) Petitioners asserted that the April 1, 1993 compliance date would force hazmat employers to expend substantial resources training employees in both pre-HM-181 and post-HM-181 requirements. Petitioners stated that an extension of the training compliance date would allow hazmat employers to concentrate resources on educating hazmat employees on post-HM-181 requirements and relieve them of the administrative and financial burden of training employees on requirements which will soon be obsolete.

RSPA agrees with these petitions. Therefore, in this document RSPA is revising § 172.704(c)(1)(i) to require completion of training by October 1, 1993 for current employees and those hired on or before July 2, 1993 (i.e., 90 days or more prior to October 1, 1993) and is revising § 172.704(c)(1)(ii) to require completion of training within 90 days of employment for those hired after July 2, 1993. It should be noted that HMTUSA required each hazmat employee to begin training current employees within six months (i.e., by November 15, 1992) after issuance of the May 15, 1992 final rule. This revision to the final rule does not affect the HMTUSA requirement for commencement of training.

Petitions Denied

A railroad petitioned that the two-year recurrent training period be extended to a three-year cycle for consistency with Federal Railroad Administration (FRA) requirements in 49 CFR part 240 for certification of railroad engineers. RSPA denies this petition. Certification requirements for railroad engineers under 49 CFR part 240 are distinct from hazardous materials training requirements under 49 CFR part 172 and RSPA sees no pressing need for identical training cycles. RSPA has previously considered and rejected comments regarding alternative training periods in the May 15, 1992 final rule. This petitioner did not present any new information to warrant changing the requirement.

A maritime association requested an exception from the two-year recurrent training requirement for hazmat employees who handle hazardous materials as an incidental part of their employment (i.e., marine cargo handling and warehousing). In place of biannual training, training would be provided "* * * with such frequency necessary to provide employees with information on current regulation requirements." The petitioner stated that the definition of a "hazmat employee" remains ambiguous as to its application to longshoremen and believes that most longshoremen do not strictly fit into the definition since their employment does not "directly affect hazardous materials transportation safety." The petitioner stated that while necessary information and training should be provided to these employees, the frequency of the recurrent training requirement is considered to be excessive.

The maritime association also requested that they be allowed to maintain records of training for members of their union. The petitioner stated that labor is dispatched on a daily basis from a union hall. Individuals may work for multiple employers during the course of one week. Historically, the association stated that they have provided hazmat training to the union work force and petitions that the exact location where a hazmat employee's training record is kept should be determined by the employer.

RSPA denies this petition for the following reasons. First, a longshoreman or other employee who handles hazardous materials, regardless of frequency, affects transportation safety and is unquestionably a hazmat employee. An occasional employee who only handles hazardous materials occasionally needs recurrent training at least as often as an employee who regularly handles hazardous materials, to ensure the employee's continuing awareness of safety considerations and regulatory requirements. The information presented in the petition does not justify an exception to the two-year recurring training requirement for hazmat employees who handle hazardous materials as an incidental part of their employment. Second, § 172.704(d) of the final rule requires that a record certifying each hazmat employee's current training be created and retained by the hazmat employer. The location of the record of training is not specified. If agreed to by both the hazmat employer and the union, the union could maintain the required records on behalf of the hazmat employer. Under the HMR, both could be held responsible for recordkeeping requirements. According, RSPA believes that no change to the requirement is necessary.

One petitioner asked RSPA to delay, until the first round of recurrent training is completed, the testing and certification of current hazmat employees who have already been trained. The petitioner stated that testing undertaken merely to meet the testing requirements would not be as effective as an integrated program; and that such a delay would allow employers to consider the most effective means of testing currently trained employees based on their job function and the type of training necessary.

The purpose of testing and certification is to ascertain whether the employee has familiarity with the general provisions of the Hazardous Materials Regulations (HMR), is able to recognize and identify hazardous materials, has knowledge of specific requirements of the HMR applicable to functions performed by the employee, and has knowledge of emergency response information, self-protection measures and accident prevention methods and procedures. By delaying the completion date for training current hazmat employees until October 1, 1993, RSPA is providing sufficient time for hazmat employers to train, test, and develop the recordkeeping documentation. Therefore, the petition is denied.

Except as adopted herein, all petitions for reconsideration received by RSPA regarding issues addressed by the final rule published on May 15, 1992, are denied. Any subsequent submission regarding issues relating to this rulemaking should be filed as a petition for rulemaking in conformance with 49 CFR 106.31.

Section-by-Section Review

Part 172; Hazardous Materials Table, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements

Section 172.704. Paragraph (a)(1) is revised to correct punctuation. Paragraph (a)(2)(i) is amended to clarify that training is required for hazmat employees who perform functions subject to conditions specified by exemptions issued under the HMR. Paragraph (a)(2)(ii) is revised to clarify the acceptability of function-specific training under the ICAO Technical Instructions and the IMDG Code, to the extent that compliance with these regulations is authorized under the HMR (see §§ 171.11 and 171.12), as an alternative to function-specific training under corresponding provisions of the HMR.

As discussed above, the dates in paragraph (c)(1)(i) are revised to require completion of training by October 1, 1993, for hazmat employees employed on or before July 2, 1993. Also, the date in paragraph (c)(1)(ii) is revised to require training within 90 days of employment for employees employed after July 2, 1993.

Part 177—Carriage by Public Highway

Section 177.816. Editorial changes are made including deletion of carrier requirements that are not directly related to safety in a functional sense. In the final rule issued on May 15, 1992, RSPA inadvertently required that training in the Motor Carrier Safety Regulations, as required in paragraph (a), meet the frequency and recordkeeping requirements in § 172.704. Accordingly, paragraph (c) is revised and a new paragraph (d) is added to clarify that the frequency and recordkeeping requirements in § 172.704 apply only to the specialized requirements for cargo tanks and portable tanks in paragraph (b).

Rulemaking Analyses and Notices

A. Executive Order 12291 and DOT Regulatory Policies and Procedures

This final rule has been reviewed under the criteria specified in section 1(b) of Executive Order 12291 and is determined not to be a major rule. Although the underlying rule was considered to be "significant" under the regulatory procedures of the Department of Transportation, this document is considered to be non-significant because it clarifies and corrects provisions of the final rule and provides limited relief to the regulated industry. The regulatory evaluation for the final rule was reexamined, but was not modified because the changes made under this rule will result in a minimal economic benefit for the regulated industry.

B. Executive Order 12612

This action has been analyzed in accordance with the principles and criteria in Executive Order 12612. This final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

C. Regulatory Flexibility Act

Based on limited information concerning size and nature of entities likely to be affected by this rule, I certify this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

D. Paperwork Reduction Act

Under section 106(b)7 of the HMTA, the information management requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) do not apply to this final rule.

List of Subjects

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting, recordkeeping, and training requirements.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR parts 172 and 177 are amended as follows:

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

1. The authority citation for part 172 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, and 1808; 49 CFR part 1, unless otherwise noted.

2. In § 172.704, paragraphs (a)(1), (a)(2), (c)(1)(i) and (c)(1)(ii) are revised to read as follows:

§ 172.704 Training requirements.

(a) Hazmat employee training shall include the following:

(1) *General awareness/familiarization training.* Each hazmat employee shall be provided general awareness/ familiarization training designed to

provide familiarity with the requirements of this subchapter, and to enable the employee to recognize and identify hazardous materials consistent with the hazard communication standards of this subchapter.

(2) *Function-specific training.* (i) Each hazmat employee shall be provided function-specific training concerning requirements of this subchapter, or exemptions issued under subchapter B of this chapter, which are specifically applicable to the functions the employee performs.

(ii) As an alternative to function-specific training on the requirements of this subchapter, training relating to the requirements of the ICAO Technical Instructions and the IMDG Code may be provided to the extent such training addresses functions authorized by §§ 171.11 and 171.12 of this subchapter.

* * * * *

(c) * * *

(1) * * *

(i) Training for a hazmat employee employed on or before July 2, 1993, shall be completed prior to October 1, 1993.

(ii) Training for a hazmat employee employed after July 2, 1993, shall be complete within 90 days after employment.

* * * * *

PART 177—CARRIAGE BY PUBLIC HIGHWAY

4. The authority citation for part 177 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805; 49 CFR part 1.

§ 177.816 [Amended]

5. In § 177.816, the following changes are made:

(a) In paragraph (a), the words "383, 387," are removed.

(b) In paragraph (a), the word "399" is removed and replaced with word "397".

(c) In paragraph (a)(4), the word "navigating" is removed and replaced with the word "maneuvering".

6. In § 177.816, paragraph (c) is revised and paragraph (d) is added to read as follows:

§ 177.816 Driver training.

* * * * *

(c) The training required by paragraphs (a) and (b) of this section may be satisfied by compliance with the current requirements for a Commercial Driver's License (CDL) with a tank vehicle or hazardous materials endorsement.

(d) Training required by paragraph (b) of this section must conform to the requirements of § 172.704 of this subchapter with respect to frequency and recordkeeping.

Issued in Washington, DC, on January 15, 1993 under authority delegated in 49 CFR part 1.

Douglas B. Ham,

Acting Administrator, Research and Programs Administration.

[FR Doc. 93-1515 Filed 1-21-93; 8:45 am]

BILLING CODE 4910-60-M

federal register

Friday
January 22, 1993

Part IV

Environmental Protection Agency

Incentives for Development and Registration of Reduced-Risk Pesticides Program Update; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OPP-36184B;FRL-4184-7]

Incentives for Development and Registration of Reduced-Risk Pesticides Program Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice is a follow-up to the Environmental Protection Agency's initiative to establish incentives for the development, registration, and use of reduced-risk pesticides (57 FR 32140; July 20, 1992). It serves as an interim report of EPA's progress, an overview of plans for the future and describes the Agency's short-term and long-term strategies. A Pesticide Regulation (PR) Notice is being prepared and will be sent to all parties holding Federal pesticide registrations. The PR Notice will provide guidance on the EPA's interim process for identifying new active ingredients which may be eligible for priority treatment as lower-risk pesticides. Applicants seeking a new active ingredient registration are invited to provide an explanation accompanied by any supporting information on why their application and any associated tolerance petitions may qualify for special consideration as a reduced-risk pesticide. EPA's long-term plans include (1) developing criteria for identifying lower risk pesticides to use as a factor in setting priorities and scheduling reviews of applications to register new pesticides, (2) streamlining the overall registration process, (3) improving the information content of pesticide labels and promoting other educational efforts to better inform the public and encourage more informed user choice, and (4) considering legislative approaches to encourage the registration of new reduced-risk pesticides by extending the periods of exclusive use under FIFRA or patent term protection, to qualifying pesticides.

FOR FURTHER INFORMATION CONTACT: Stephanie R. Irene, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, (703) 305-5447.

SUPPLEMENTARY INFORMATION:

Electronic Availability: This document is available as an electronic file on *The Federal Bulletin Board* at 9:00 a.m. on the date of publication in the **Federal Register**. By modem dial (202) 512-1387 or call (202) 512-1530 for disks or paper copies. This file is also available in Postscript, Wordperfect and ASCII.

I. Background

A. Introduction

EPA has embarked on a reduced-risk pesticide initiative with the primary objective of encouraging the development, registration and use of lower risk pesticides and pest management practices in order to lessen risks to human health and the environment. Because of the significance and complexity of the topic, EPA announced its interest in developing new policies in this area and solicited public comment via a **Federal Register** notice published July 20, 1992 (57 FR 32140), and a public workshop held October 5 and 6, 1992.

B. Public Involvement

1. **Federal Register** *Notice*. EPA identified two basic objectives for a reduced-risk policy with several possible actions for implementing each. The first objective is to create incentives for the development, registration, and use of lower risk pesticides; the second is to encourage the replacement of higher risk pesticides on the market. EPA also invited discussion on how the EPA should identify lower-risk and higher-risk pesticides.

EPA listed several possible incentives to encourage lower risk pesticides, including early counseling of applicants for registration, giving priority status to potentially lower risk pesticides in the review process, waiving fees, reducing or deferring data requirements, and allowing safety claims in labeling and in advertising to foster competition in favor of reduced-risk products. EPA described possible approaches for encouraging the replacement of higher risk pesticides, such as those which may in the past have been retained only because there were no cost-effective, lower-risk alternatives. The Agency suggested several possible actions with respect to such pesticides, including publishing a list of higher risk uses, screening applications claiming to replace higher risk uses and giving qualifying applications priority for review and waiving fees. EPA also suggested the possibility of reevaluating the registration of higher risk pesticides for potential regulatory action, i.e., restriction or cancellation, when safer, effective alternatives are registered.

2. *Public workshop.* Due to the potential impacts and complexity of this topic, EPA conducted a public workshop on October 5 and 6, 1992 to further explore the issues. Over 200 participants attended. The Agency appreciates the interest and enthusiasm of all attendees who provided candid, albeit differing viewpoints on how the Office of Pesticide Programs could accomplish its intended goals.

The period for accepting written comments was extended to November 5 to incorporate additional ideas and responses generated from the workshop. EPA has received a total of 152 written comments. EPA would like to thank everyone who provided valuable input by participating in the workshop and/or responding to the **Federal Register** notice. Many of the comments provided imaginative ideas and suggestions and will greatly assist the Agency in policy formulation.

II. Strategy

A. Short Term Approach

EPA is implementing an interim strategy while policy is being developed. The Agency wishes to capture good ideas that can be implemented quickly. The Office of Pesticide Programs (OPP) will be issuing a Pesticide Regulation (PR) Notice to all pesticide registrants. This PR Notice will announce that, in scheduling the review of pesticide applications involving new active ingredients, one of the factors EPA will consider is the opportunity for reduced risk. The Notice will provide general guidance and describe the type of information that OPP will need to evaluate such requests. By adopting this voluntary pilot program, EPA can test its feasibility, obtain additional comments from outside sources, and improve the Agency's ability to devise a long term strategy.

Applicants who believe they have developed a qualifying new active ingredient will be invited to submit a rationale substantiating their case as part of their application for registration. The applicants will be asked to discuss why their product(s) presents a reduced risk and make a comparison between the risks posed by the new active ingredient under consideration and the other pesticides for that use. Registrants should consider human health, environmental fate and ecological effects, other hazards and pest resistance management. In addition, they may consider the cost of the product relative to substitutes. An application's review priority will depend on the Agency's determination that the new active ingredient may pose significantly lower risks. The PR Notice will give additional details on topics that should be addressed in any such request for special consideration.

B. Long Term Approach

To develop a more comprehensive reduced-risk policy, EPA will focus on four major issues. The plan is first to develop specific criteria for identifying lower risk pesticides for accelerated review and to work on streamlining the entire registration process for all products. Exploration of potential product label reform and the possible extension of exclusive use or patent terms, which could require more complex rulemaking or legislative changes, will follow. While EPA has decided not to publish a list of higher risk pesticides at this time, it may revisit the issue after the completion of the reregistration program, when a more complete data base should permit more reliable comparisons among pesticides. The four main elements of the longer term strategies are described below:

1. *Developing criteria.* EPA intends to establish a list of criteria for identifying a reduced-risk pesticide. These criteria should be science-based, and they should provide assurance of protection of public health and the environment. The application of each criterion should be sufficiently objective that incoming pesticide applications may be screened quickly to identify lower risk candidates before the detailed review begins. Therefore, the initial identification process should not significantly delay review of an incoming application regardless of whether it ultimately conforms to the reduced-risk standard. EPA intends to work with industry and academia to develop the criteria.

2. *Streamlining the registration process.* EPA currently has in place several teams or workgroups whose charge is to analyze the registration process to recommend efficiencies. The streamlining sought will affect all incoming actions and not be limited to those claiming lower risk. Areas where internal process improvements are being developed are new chemicals and tolerances, Fast Track registrations, and Special Local Needs (section 24(c)) registrations. Additionally, OPP is focusing on streamlining ecological effects and environmental fate data requirements, and revising pesticide tolerance crop groupings. Finally, we are considering the possibility of exempting from FIFRA registration requirements pesticidal materials recognized to be of low risk. Candidates may include some of the materials which EPA has recently found eligible for reregistration, such as dried blood and putrescent egg solids.

3. *Pesticide label reform and informational outreach.* In order to promote the goal of encouraging pesticide users to choose and utilize reduced-risk pesticides, EPA is considering revising its pesticide labeling policy, for example, by allowing registrants to make safety claims on their labels. Several workgroups within the Agency are addressing the complex and multifaceted issues which arise with labeling. These groups were established to seek improvements in the scope and utility of, policy for, and the process for developing pesticide labeling.

EPA will also consider other mechanisms to reach interested persons with improved information about pesticides that may affect them, others, or the environment in general. The Agency plans to improve the informational content of pesticide labels and develop other educational sources e.g., pesticide fact sheets and training programs to permit more informed choices by users and other affected parties. In addition, the Agency is considering allowing comparative-safety-and-efficacy claims in advertising materials to inform users of risks and benefits.

4. *Extending exclusive use or patent term extension incentives.* One of the strongest and more significant economic incentives, as expressed by representatives of the pesticide industry, would be the extension of the exclusive use period of a pesticide as established in FIFRA section 3(c)(1)(D) or the granting of an extension of the patent term for a lower risk pesticide. Currently, a portion of an applicant's period of patent protection is taken up by the Agency's review process, thus shortening the actual time the product is on the market under patent. If this period is extended, the registrants believe they would be able to recoup their research and development expenses more quickly, thereby encouraging the development of new pesticides. EPA will examine the options in this area for providing meaningful incentives for the development of lower risk pesticides.

EPA realizes that developing a comprehensive Reduced-Risk Policy incorporating the listed objectives will require significant time and resources. It believes, however, that the immediate actions being taken will result in progress toward the end of lessening risks from pesticides to human health and the environment.

Dated: January 13, 1993.

William K. Reilly,

Administrator, Environmental Protection Agency.

[FR Doc. 93-1499 Filed 1-21-93; 8:45 am]

BILLING CODE 6560-50-F

Friday
January 22, 1993

Part V

Environmental Protection Agency

Amitrole; Notice of Final Determination for Termination of the Amitrole Special Review

ENVIRONMENTAL PROTECTION AGENCY

[OPP-30000/38B; FRL4181-4]

Amitrole; Notice of Final Determination for Termination of the Amitrole Special Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final determination and termination of Special Review.

SUMMARY: In a **Federal Register** Notice of October 8, 1992 (57 FR 46448), EPA proposed to terminate the Amitrole Special Review based on the determination that the benefits of use outweigh the risks. The Agency solicited public comments for a 30-day period and no comments were received. Therefore, with this Notice, EPA is announcing that it has terminated the Amitrole Special Review.

FOR FURTHER INFORMATION CONTACT: By mail Philip J. Poli, Review Manager, Special Review Branch, Special Review and Reregistration Division (H7508W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW. Washington, DC 20460. Office location and telephone number: Third floor, Westfield Bldg., 2800 Jefferson Davis Highway, Arlington, VA. (703) 308-8038.

SUPPLEMENTARY INFORMATION:

Electronic Availability: This document and the Preliminary Determination to Terminate the Amitrole Special Review are available as an electronic file on the *Federal Bulletin Board* at 9 a.m. on the date of publication in the **Federal Register**. By modem dial (202) 512-1387 or call (202) 512-1530 for disks or paper copies. This file and the Preliminary Determination are available in Postscript, Wordperfect 5.1 and ASCII. The Preliminary Determination was published in the **Federal Register** on October 8, 1992 at 57 FR 46448.

I. The EPA's Decision Regarding Special Review

This Notice concludes EPA's administrative Special Review of the risks and benefits of amitrole which was initiated in a **Federal Register** Notice of May 15, 1984 (49 FR 20546). In the October 8, 1992 **Federal Register** (57 FR 46448), EPA announced its intent to terminate the Amitrole Special Review. As stated in that document, based on its risk and benefits assessment, EPA has concluded that the benefits provided from the continued existing use of amitrole outweigh the risks. EPA has received no comments in response to the October 8, 1992 Notice. Accordingly, for the reasons set forth in the October 8, 1992 Notice (57 FR 46448), EPA is announcing that it has terminated the Amitrole Special Review.

II. Availability of Public Docket

EPA established a public docket for the Amitrole Special Review. This public docket includes this Notice; any other Notices pertinent to the Amitrole Special Review and to EPA's decision regarding the termination of the Amitrole Special Review; documents not considered Confidential Business Information; copies of written comments or other materials submitted to EPA at any time during the Special Review process by any person outside the government in response to the Amitrole Special Review; and a current index of materials in the public docket. The public docket is located in Rm. 1132, Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, VA. 22202 and can be viewed from 8 a.m. to 4 p.m. Monday through Friday, excluding legal holidays.

Dated: December 31, 1992.

Linda J. Fisher,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 93-1501 Filed 1-21-93; 8:45 am]

BILLING CODE 6560-50-F