CALIFORNIA GAMBLING CONTROL COMMISSION

Detailed Response to Tribal-State Association Objections to Minimum Internal Control Standards (MICS) (CGCC-8)

Compact section 8.4.1 sets out procedures for the State Gaming Agency (SGA) to propose uniform statewide regulations governing Class III gaming operations and for the Association of Tribal and State Gaming Regulators (Association) to approve or disapprove them. Section 8.4.1 (b) provides that the SGA may re-adopt a regulation in its original or amended form after disapproval by the Association, and then submit the regulation to each individual tribe, provided that the SGA prepares a detailed, written response to the Association's objections.[1][2] Compact section 8.4.1(e) states that tribes may object to a proposed statewide uniform regulation on any of four enumerated grounds: that is, that the regulation is "unnecessary, unduly burdensome, conflicts with a published final regulation of the [National Indian Gaming Commission], or is unfairly discriminatory . . . ."

At its September 4, 2008 meeting, the Association voted to disapprove proposed regulation CGCC-8, regarding Minimum Internal Control Standards (MICS), based upon the objections stated in the Association Task Force Report, dated February 13, 2008 and in letters received within 14 days of the vote.[3]

The following tribes, tribal gaming agencies, or commissions sent in timely comments: Cahuilla Tribal Gaming Agency, Dry Creek Rancheria Band of Pomo Indians, Elk Valley Rancheria, Paskenta Band of Nomlaki Indians Tribal Gaming Commission, Rincon Band of Luiseño Indians, Rumsey Indian Rancheria of Wintun Indians, and Torres Martinez Gaming Commission. The Department of Justice, Bureau of Gambling Control sent in a letter on September 29, 2008. (These comment letters are attached as Exhibits "A1-A8 respectively".)

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[1] Compact section 8.4.1, subsection (b) provides "Every State Gaming Agency regulation that is intended to apply to the Tribe (other than a regulation proposed or previously approved by the Association) shall be submitted to the Association for consideration prior to submission of the regulation to the Tribe for comment as provided in subdivision (c). A regulation that is disapproved by the Association shall not be submitted to the Tribe for comment unless it is readopted by the State Gaming Agency as a proposed regulation a proposed regulation in its original or amended form with a detailed written response to the Association's objections.

[2] The State believes that section 8.4.1, subsection (b) provides a clear exception to the general proposition in subsection (a) of 8.4.1 that the regulation has to be approved by the Tribal-State Association. This readoption and response procedure constitutes a clear exception to the general requirement that the Association approve a regulation before it may be effective. Any other interpretation would render subsection (b) mere surplusge, and such a construction must be avoided. (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495,503 [language in a contract must be interpreted as a whole and constructions that render contractual provisions surplusage are disfavored].)

[3] The motion made at the meeting was to oppose the adoption of the CGCC-8 regulation based on the objections in the Task Force Report of February 13, 2008.

This document is the written response to the Association's objections as required by subsection 8.4.1. It includes the rationale for the CGCC-8 text (dated October 1, 2008) and a detailed response to the objections raised. The Commission's Response to the Task Force Report dated April 23, 2008 is also incorporated herein. (Attached as Exhibit "B".)

PART I. RATIONALE FOR MINIMUM INTERNAL CONTROL STANDARDS (MICS)

(GCC-8 amended form dated October 1, 2008)

1. INTRODUCTION

Internal controls are the primary procedures used to protect the integrity of casino gaming operations, which is cash intensive, and are a vitally important part of properly regulated gambling. Inherent in gaming operations are problems of customer and employee access to cash, unrecorded cash transactions at table games, manipulation of credit, questions of fairness of games, and the threat or risk of collusion to circumvent controls.[4] Internal control standards are therefore commonplace in the gambling industry and many tribes in California currently have some standards in place.

> Inherent in an internal control structure are the concepts of individual accountability and segregation of incompatible functions. The existence of standards alone, however, is not enough. Any internal control system carries the risk of circumvention, which is why a process of *independent* oversight is so critical to the integrity of an operation. (Emphasis added.)[5]

Under IGRA, a tribe conducts Class III gaming pursuant to a compact with the state. (See 25 U.S.C. § 2710(d)(1)(c).) After the Secretary of the Interior approves the compact, the "*Tribal-State compact govern[s] the conduct of [class III] gaming activities"* § 2710(d)(3)(A) (emphasis added), and the tribe's class III gaming operations, including standards for operation, must be "conducted in conformance" with the compact, § 2710(d)(1)(C) and § 2710(d)(3)(C)(vi) and (vii).

2. NATIONAL INDIAN GAMING COMMISSION MICS

The National Indian Gaming Commission (NIGC) NIGC Minimum Internal Control Standards (MICS) were designed to establish a baseline, that is, **minimum** internal control standards, to be required of tribal gaming operations. Initially adopted in 1999, the NIGC MICS have been amended over the years to take into account advances in technology, and to clarify certain requirements.

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[4] The most recent totals for the United States Indian gaming revenue for 2007 stood at over $26 billion. Source: *NIGC Strategic Plan for Fiscal Years 2009-2014*, page four. The link is http://www.nigc.gov/LinkClick.aspx?fileticket=gruAugiyc28%3d&tabid=36&mid=345. Page four of the Plan is included as Exhibit "C."

[5] Written Remarks of National Indian Gaming Commission Chairman Montie R. Deer before the Senate Committee on Indian Affairs, March 14, 2002. (See complete remarks attached as Exhibit "D.")

The NIGC MICS are structured by size of gaming operations rather than by type of game, thus recognizing that the requirements placed upon tribal gaming operations should differ based upon their annual gross gaming revenue. Costs involved in implementing controls are part of the regular business costs incurred by a gambling operation. Because different states have different compacts as to types of games offered (such as craps, roulette, or pari-mutuel wagering) or as to credit, or because certain tribes opt not to offer particular games or extend credit, the NIGC MICS cover some areas not applicable to all tribes. However, as long as the tribal internal controls met or exceeded the standards in the NIGC MICS for the applicable areas, uniform standards were achieved.

3. THE *COLORADO RIVER INDIAN TRIBES* (*CRIT)* DECISION

In *Colorado River Indian Tribes v. National Indian Gaming Commission (CRIT),* 466 F.3d 134, decided October 20, 2006, by the United States Court of Appeals for the District of Columbia Circuit, the court held that NIGC did not have the authority to promulgate or enforce the MICS with regard to Class III gaming. This decision effectively eliminated the federal government's authority and jurisdiction to regulate Class III gaming in California, at least with regard to the Class III MICS. The court clearly held that the declared policy of shielding Indian tribes "from organized crime and other corrupting influences" and "to assure that gaming is conducted fairly and honestly by both the operator and players" for Class III gaming is accomplished through the only allowable statutory basis for such, through the Tribal-State compacts. (*CRIT*, *supra,* 466 F.3d, at p. 140; emphasis added.) The existing framework under IGRA of Tribal-State Compacts establishing the regulatory rules for Class III gaming did not change with the *CRIT* decision.

4. THE AUTHORITY OF THE STATE GAMING AGENCY

The Preamble to the Compact provides that the Compact is made pursuant to IGRA and that the system of regulation fashioned by Congress in IGRA rests on an allocation of regulatory jurisdiction among three sovereigns – the federal government, the State, and the Tribe. The Compact recognizes the State's interest in ensuring, jointly with the tribes, that "tribal gaming activities are free from criminal and other undesirable elements" (Compact Preamble, paragraph (F). One of the stated Purposes and Objectives of the Compact is to ensure that Tribal Class III gaming is "conducted fairly and honestly by both the operator and players" (Compact Preamble, paragraph A). See also Compact section 1(b) (compact purpose is to ensure "fair and honest operation" of Class III gaming in accordance with IGRA).

The primary responsibility for regulating the gaming operation rests with the Tribe. Specifically, the Tribe must adopt a gaming ordinance and conduct its gaming activities in compliance with that ordinance and rules, regulations, procedures, specifications, and standards adopted by the Tribal Gaming Agency (TGA). In addition to oversight by the TGA, NIGC has in the past performed the valuable role of providing independent outside oversight, as in the area of MICS compliance review.

The SGA also has a role and has the authority to promulgate regulations to establish statewide uniform operating procedures. Section 8.0 of the Compact is entitled "Rules and Regulations for

the Operation and Management of the Tribal Gaming Operation." Section 8.1 of the Compact is entitled "Adoption of Regulations for Operation and Management: *Minimum Standards*." (Emphasis added.) Section 8.1 states that that each Tribal Gaming Agency must adopt rules, regulations, and specifications concerning, *at a minimum*, thirteen enumerated topics "and to ensure their enforcement in an effective manner." (Emphasis added.) Section 8.4 (no title) provides in substance as follows:

1. That the parties agree that the SGA, for the purpose of fostering "statewide uniformity of regulation of Class III gaming operations throughout the state," has the power to adopt regulations on "<u>any</u> matter encompassed by Section 6.0, 7.0. and 8.0". (Emphasis added.)

2. That the rules, regulations, standards, specifications, and procedures adopted by the Tribal Gaming Agency "shall be consistent with regulations adopted by the State Gaming Agency in accordance with Section 8.4.1." [6]

Essentially, statewide uniform regulations under Section 8.4 can encompass any matter within Compact Sections 6.0, 7.0 and 8.0, and the TGA rules, regulations and standards must be consistent with statewide uniform regulations adopted by the SGA. Section 7.1 of the 1999 Compact, and comparable sections of new or amended Compacts, requires the TGA to adopt and enforce regulations which ensure that the Gaming Operation "meets the highest standards of regulation and internal controls." Section 8.1 of the 1999 Compact, and comparable sections of new or amended Compacts, charge the TGA with responsibility to promulgate such rules, regulations and specifications and to ensure their enforcement. Compact sections 8.1.1 through 8.1.14 outline the matters which, at a minimum, these rules, regulations, and specifications must address. Compact sections 7.4 through 7.4.4 provide the SGA the authority to inspect the Gaming Facility, as defined in the Compact, as reasonably necessary to ensure compliance with the Compact. The purpose of this regulation (CGCC-8), pursuant to Section 8.4, is to provide an effective uniform manner in which the SGA can conduct compliance reviews of the adoption and enforcement of these rules, regulations, and specifications by the TGA, and to protect the public as well as each tribe.

In light of the fundamental importance of MICS in protecting the integrity of the Gaming Activities and ensuring the successful functioning of Class III Gaming operations, it is appropriate for the SGA to adopt uniform, minimum requirements for MICS: that is, to require TGAs to adopt MICS which equal or exceed the MICS as promulgated by the NICG as of October 1, 2006 and to require each tribal Gaming Operation to implement internal control systems that ensure compliance with the TGA MICS.

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[6] Compact Section 8.4 provides in full:
" <u>In order to foster statewide uniformity of regulation of Class III gaming operations throughout the state</u>, rules, regulations, standards, specifications, and procedures of the Tribal Gaming Agency in respect to any matter encompassed by Sections 6.0, 7.0, and 8.0 shall be consistent with regulations adopted by the State Gaming Agency in accordance with Section 8.4.1. Chapter 3.5 (commencing with section 11340) or Part 1 of Division 3 of Title 2 of the California Government Code does not apply to regulations adopted by the State Gaming Agency in respect to tribal gaming operations under this section." (Emphasis added.)

The California Gambling Control Commission (Commission) has specific responsibilities under the Tribal-State Gaming Compacts including the auditing of funds for the General, Special Distribution, and Revenue Sharing Trust Funds. The Commission has the obligation to verify the proper receipt of money due to the state under the compacts, and ensure that the State's interest in this revenue stream is protected. MICS provide safeguards that ensure the revenue is reported and provide the ability to check the accuracy of the numbers. The State in the Compact reserves the right to inspect and have access to the gaming operation and to copy papers, books, and records related thereto. (See Compact, Sec. 7.4.) Among those books and records available for inspection are those related to the matters set forth in Sec. 8.0 of the Compact. Among those matters in 8.0 are items related to MICS. (See, for example, Compact Secs. 8.1 – 8.1.14, inclusive, which covers such things as employee procedures designed to permit detection of theft, cheating or fraud, and maintenance of closed circuit television surveillance system and cashier's cage.) Therefore, the Commission has the authority under the Compact to inspect all books and records relating to a tribe's MICS.

For a variety of reasons, including the presence of the federal government assuming a prominent regulatory role, the State's oversight and auditing have to date been focused on the Revenue Sharing Trust Fund, the Special Distribution fund, and, under new and amended compacts, contributions to the General Fund. Now with the determination that the Compact provides the exclusive authority for Class III MICS oversight, the State must turn its attention to this oversight of Tribal Gaming Operations to ensure the integrity of the operation for the public, thus CGCC-8.

5. CGCC-8 -- MINIMUM INTERNAL CONTROL STANDARDS

CGCC-8 establishes a uniform basic standard and protocol for state oversight of tribal regulation of gaming operations. It does this by establishing the federal MICS as a baseline for tribal gaming operations. Using the NIGC MICS as a baseline standard ensures consistency and uniformity while taking into account the size of gaming operations. Further, since many tribes have been accepting this standard for years, this approach eliminates duplication or unnecessary promulgation of new rules, regulations, or specifications. The state has significant oversight authority as outlined above. CGCC-8 is not an expansion of that authority, but recognition that the authority existed all along, and is rather an exercise of that authority. CGCC-8 tracks the federal MICS as closely as possible; any provision of CGCC-8 that was even arguably inconsistent with or not authorized by the Compact has been eliminated. CGCC-8 has thus been drawn as narrowly as possible, while still protecting the integrity of tribal gaming.

Additionally, the CGCC-8 regulation reiterates the provisions in existing compacts that utmost care will be given in regard to protecting the confidentiality of information provided by the tribe. The extent of the information being shared under this regulation is generally the same as what the tribes were sharing with the federal government, and thus no new or additional information is being shared with an outside (non-tribal) governmental agency.

6. OTHER FACTORS MENTIONED IN THE PROTOCOL CRITERIA

(i) **Economic Impact**. This proposed regulation should have no additional economic impact, since many tribes have been complying with the NIGC MICS since 1999 or

have some form of internal controls because such controls are considered essential to protecting gaming assets. Thus, this regulation is not unduly burdensome.

Under the NIGC MICS, gaming operations are tiered by revenues, with tighter and more controls imposed as the revenues increase.[7] NIGC indicated in its Final Rule Revisions 25 CFR Part 542, 71 Fed. Reg. 277385 (May 11, 2006) at p. 27390, that compliance with the requirement that independent certified public accountant (CPA) testing occur will cost, for small gaming operations, between $3,000 and $5000. This testing measures the gaming operation's compliance with the Tribe's internal control standards. This cost, according to NIGC, is "relatively minimal" and "does not create a significant economic effect on gaming operations" and what little effect there is can be offset by performing the required yearly independent financial audits at the same time. Therefore, for these reasons these proposed regulatory standards do not disparately impact small tribal operations over large operations, and this regulation will not have significant economic impact. The regulation is thus not unduly discriminatory amongst tribes.

(ii) **Application outside Tribal Gaming**. California cardrooms (gambling establishments) are governed not only by numerous provisions of the Penal Code[8] and the Business and Professions Code,[9] but also by regulations adopted by the Commission[10] and by the Department of Justice, Bureau of Gambling Control.[11] Strict regulations are in place concerning cardroom accounting and financial reporting.[12] Cardrooms must, for example, maintain records of the drop for each table for a period of seven years, which records must be provided upon request to the State. The chart of accounts used in each cardroom's accounting system must be approved by the Commission.[13] All cardrooms with a gross annual revenue of $10 million or more must have an annual audit done by an independent California CPA, a copy of which audit must be provided to the State, along with the management letter and reply to the management letter, if any.[14] Cardrooms with a lower annual gross revenue may be directed to have an audit performed if the State has concerns about the licensee's operation or financial reporting, including but not limited to inadequate "internal control procedures."[15] In addition, the State may require the cardroom to

[7] Under the NIGC MICS, the provisions do not apply to operations that have gross revenues under $1 million. Tier A facilities are those with gross revenues between $1 and $5 million; Tier B facilities are those with gross revenues of more than $5 but not more than $15 million; and Tier C facilities are those with gross revenues of more than $15 million.
[8] See, for example, Penal Code sections 337j (e) (defining "controlled game") and 330 (listing prohibited games).
[9] The Gambling Control Act, Business and Professions Code sections 19800-19987.
[10] Commission regulations are found in Title 4 CCR sections 12002-12590.
[11] Bureau regulations are found in Title 11 CCR sections 2000-2142.
[12] See CGCC regulations at Title 4 CCR sections 12400—12406.
[13] Title 4 CCR section 12402.
[14] Title 4 CCR section12403.
[15] Title 4 CCR section 12403(a).

have a fraud audit performed by an independent CPA in the event that fraud or illegal acts are suspected.[16]

Further, following a 45-day comment period and a public hearing in April 2008, Commission-drafted MICS for extension of credit, check cashing and ATMs for cardrooms were sent out for a 15-day comment which ended October 8, 2008. Adoption of these latter regulations should be completed by the end of October 2008. The draft minimum internal control standards for cardroom security and surveillance procedures have been sent out for comment and are set for public hearing on November 18, 2008. The goal is to have these regulations in place by early 2009. Workshops are being conducted on the remaining phases and will be added as soon as possible through the State rulemaking process. As the tribes are aware from their participation in the NIGC MICS, the MICS process takes considerable time to complete. IGRA was enacted in 1988 and the NIGC MICS were not promulgated until 1999.

The California Horse Racing Board (Board) has detailed regulations as to the types of races, wagering, and pools, as well as requirements for outside audits to be performed and submitted to the Board.

CGCC-8 is thus not "unduly discriminatory" against tribes vis-a- vis others in the gaming industry, such as cardrooms and racetracks.

(iii) **Uniformity**. By adopting the longstanding NIGC MICS, this draft regulation fosters uniformity in Tribal Gaming in continuing the baseline internal control standards. Some tribes have apparently entered into agreements with the federal government to perform MICS oversight or have voluntarily submitted to the federal government's "jurisdiction" via ordinance. These tribes assert that the Commission's CGCC-8 does not "foster uniformity" because uniformity is accomplished by the tribes voluntarily consenting to NIGC "jurisdiction and authority." However, that argument is fallacious for two reasons. First, both the agreements and the provisions in the ordinances related to MICS are *voluntary* and can be cancelled or amended at any time. Second, under the *CRIT* decision, the NIGC does not have jurisdiction or authority under IGRA to regulate class III gaming and that includes oversight, so its "exercise" of monitoring and enforcement, although an admirable attempt, is hollow. Moreover, it is significant that for six years, from 2000 to 2006, NIGC had completed on-site compliance reviews for only <u>eight</u> California tribes. At that rate, it would take 42.75 years to complete MICS compliance review for all California gaming tribes.[17] CGCC-8 thus is necessary.

[16] Title 4 CCR section 12403(d).

[17] The 42.75 year estimate is based on the following. It took six years to complete eight audits, indicating it took .75 years to complete one audit. In California, there are 57 tribes operating casinos. If you multiply .75 times 57 tribes, the result is that it would take 42.75 years to complete audits of all 57 tribes. See also Written Remarks of National Indian Gaming Commission Chairman Montie R. Deer before the Senate Committee on Indian Affairs, March 14, 2002 wherein he states that "at current [NIGC] staffing levels, it would take twenty to thirty years for the Commission to evaluate each of the existing gaming operations." (See Exhibit "D".)

(iv) **Alternatives**. An alternative to adopting the NIGC MICS would be to create a new set of minimum internal control standards. This would take a great deal of time and energy, and would result in tribes having to re-test and perhaps change their internal control systems to make sure they were in compliance. Another alternative that has been suggested is for tribes to enter into agreements with the federal government to perform the oversight or to voluntarily submit to the federal government's jurisdiction" via ordinance. However, as explained above, that is not a viable alternative because consent can be withdrawn at anytime. Although NIGC still has authority to approve Class III gaming ordinances (see 25 U.S.C. section 2710(d)(1) and (2)), the *CRIT* decision held that they have no authority over Class III gaming operations. Thus, the problem with the ordinance approach is that a tribe may subsequently amend the ordinance to remove the MICS provision and the NIGC Chairman probably cannot disapprove the ordinance on that ground. (See 25 U.S.C. section 2710 (d)(2) (B).).

As noted above, it is significant that as of March 2007, NIGC had completed compliance reviews from 2000 to 2006 for only eight California tribes.[18] The just recently published NIGC Strategic Plan (FY 2009-2014) notes on page six under Objective 1.1(Effectively monitor and enforce Indian gaming laws and regulations), that "operational compliance audits have resulted in hundreds of findings of non-compliance with required minimum internal controls relative to cash handling and revenue accountability."[19] Thus, there is a need for this regulation. The State has already completed two MICS reviews via MOUs[20] thus far in 2008 and plans on completing the remaining three by the end of the 2008/2009 fiscal year. Minimal or non-existent federal oversight is not a substitute or alternative for effective oversight by the State through the Compact.

It has been suggested that the State should enter into agreements with each tribe. First, this is unnecessary because the State has the authority through the Compact to adopt the regulation. Even if for some reason the State would want to enter into multiple agreements, there is no guarantee of uniformity because different tribes would want different standards. And finally such agreements would require the tribes to waive sovereign immunity.

(v) **Legal Authority**. See section above.

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[18] NIGC provides federal oversight to approximately 443 tribally-owned, operated, or licensed casinos operating in 29 states. Source: *NIGC Strategic Plan for Fiscal Years 2009-2014*, Overview, page one. See Exhibit "C."

[19] See Exhibit "C."

[20] The three effective MOUs and one MOA with various tribes specifically provide that they are in place so long as the statewide uniform MICS regulations are not yet in effect. (There are four MOUs but one has not been signed yet by the Tribal Chair.)

(vi) **If Statement of Need Identifies Factual Basis as the Rationale for the Need, Address Whether Duplicative**.[21] The Association's Task Force Report asserts that CGGC-8 duplicates a provision of the Indian Gaming Regulatory Act, 25 USC Section 2710(b)(2)(C) and the MICS portion of certain existing tribal regulations.

The Task Force Report at page 2 criticizes CGCC-8 for mandating "external financial audits" which are already required by IGRA and by section 8.1.8 of the 1999 Compact, and by comparable sections of new or amended compacts and asserts there is no legitimate basis for including the financial audit provision.

CGCC-8 subsection (e) specifically refers to section 8.1.8 of the Compact and it is true the subsection refers to the audit, and true that such an audit is mandated by federal law and the Compact. However, it is appropriate to mention the audit in CGCC-8 subsection (e) for several reasons.

First, this audit, although required by federal law for NIGC fee assessment purposes, was also the basic building block of the separate NIGC MICS outside oversight process. Before the *CRIT* decision, the NIGC practice was to review this audit to determine if problems had been identified suggesting that further review of compliance with MICS standards was appropriate.

Following this problem-centered approach, subsection (e) of CGCC-8 requires the tribe to provide not only the audit report itself, but also management letters and responses to management letters. The reason for this is that problems are typically highlighted in management letters; plans for resolving problems are typically highlighted in responses to management letters. (See 25 CFR § 571.13 requiring a tribe to submit to the NIGC a copy of audit reports and management letters.)

Second, subsection (e) of CGCC-8 makes clear that the tribe need not provide the complete audit because the audit will likely cover not only Class III gaming activities, but also other gaming activities. Alternatively, the tribe has option of providing the complete audit, but CGCC staff will only utilize or record those aspects of the audit affecting Class III gaming activities. This provision not only supplies specific, helpful guidance to both tribal and CGCC staff, but also clarifies the scope of state review of the independent-CPA audit.

The Task Force Report similarly suggests that CGCC-8 is duplicative because "a number of California gaming tribes" have amended their tribal gaming ordinances to

[21] The Task Force objection on grounds of "duplicative" arises from the Protocol (B. 2(b) (vi)), which may have been inspired by the rulemaking part of the California Administrative Procedure Act (APA). According to Compact section 8.4, the rulemaking part of the APA does not apply to SGA uniform regulations. Under the APA, a proposed state agency regulation must satisfy the "non-duplication" standard (Government Code sections 11349.1 and 11349(f)). However, "non-duplication" is not one of the grounds that the parties to the Compact agreed could serve as a basis for an objection to a proposed regulation.

incorporate the NIGC MICS and to grant the NIGC authority to enforce those standards. We have also been informed that some Tribes have entered into agreements with NIGC, though we have not seen copies of any agreements. It may be that tribal representatives view adoption of an amendment to a tribal gaming ordinance as tantamount to a formal written agreement. In any event, these Tribes argue that, since they have voluntarily submitted to NIGC jurisdiction and authority, CGCC-8 is duplicative. The Commission rejects this argument for three reasons.

First, the MICS amendments to the ordinances are *voluntary* acts on the part of the tribes. It is true that NIGC retains authority to approve Class III gaming ordinances, as explicitly stated in IGRA section 2710(d) (1) and (2). *CRIT* dealt with *regulation* of class III gaming operations; it did not eliminate all NIGC authority concerning Class III matters. The problem with the ordinance approach, however, is that a tribe may subsequently amend its ordinance to remove the MICS provisions and the NIGC Chairman probably cannot disapprove the ordinance amendment on the ground that a tribal ordinance must contain a MICS provision. See IGRA section 2710(d)(2)(B).

Second, written agreements between individual California tribes and NIGC, if there are any, very likely can be cancelled at any time by the tribe.

Third, NIGC does not have authority under IGRA to regulate Class III gaming operations; no agreement or tribal ordinance can provide such regulatory authority. Additionally, the state's authority to regulate Class III gaming operations pursuant to IGRA is not secondary to that of the federal government. It is absurd to suggest that the State should, in essence, acquiesce in the delegation of state responsibilities to the federal government.

Moreover, pursuant to the agreement of the parties, provisions of uniform state regulations adopted under Compact section 8.4 are <u>binding</u> on the tribes. Only a binding regulation can fully protect the public interest.

(vii) **Unnecessary**

The Task Force "duplicative" comment may also be read as suggesting that CGCC-8 is "unnecessary." For the reasons noted above, we suggest that the Task Force Report has not met its burden of persuasion on this issue, that is, the Report has not demonstrated that CGCC-8 is "unnecessary" within the meaning of Compact section 8.4.1(e).[22]

Finally, we note that section 8.4.1(e) states:

[22] Under the California APA (expressly <u>not</u> applicable here pursuant to Compact section 8.4), the state agency adopting a regulation must demonstrate by substantial evidence that the proposal is "reasonably necessary" to effectuate the purpose of the statute (Government Code sections 11340(c), 11342.2, 11349(a) and 11349.1(a)(1)). Here, by contrast, the burden is on the tribe to show that the uniform tribal regulation is "unnecessary." Compact section 8.4.1(e).

"The Tribe may object to a State Gaming Agency regulation on the ground that it is unnecessary, unduly burdensome, conflicts with a published final regulation of the NIGC, or is unfairly discriminatory, and may seek repeal or amendment of the regulation through the dispute resolution process of Section 9.0; provided that, if the regulation of the State Gaming Agency conflicts with a final published regulation of the NIGC, the NIGC regulation shall govern pending conclusion of the dispute resolution process." (Emphasis added.)

This subsection indicates that conflict with a final published NIGC regulation was a matter of sufficient importance to the parties to warrant listing among the authorized grounds for objection to a proposed statewide uniform regulation. CGCC-8 cannot conflict with a published NIGC regulation because the NIGC MICS have been held unenforceable. Additionally, by contrast, there is no mention of duplication in 8.4.1(e).

Further, while the Compact clearly states that a conflicting NIGC regulation is to govern pending conclusion of the dispute resolution process, one may logically infer that a readopted statewide uniform regulation which is allegedly unnecessary, unduly burdensome, or unduly discriminatory (or which allegedly has a flaw other than those matters specifically listed by the parties as grounds for objection) shall govern pending conclusion of the dispute resolution process.

7. FURTHER RESPONSE TO "COMPACT AMENDMENT" COMMENT

The Association's Task Force Report asserts that the State does not have the power under Compact section 8.4 to supplement or interpret Compact provisions and that uniform statewide regulations are valid only if tribes consent to them. If the State desires to address the topic of minimum internal control standards, the Association asserts that the State's only option is seek compact amendments.

The Commission believes that the 1999 Compact did not leave the State defenseless and paralyzed, that is, that the State has the ability under the Compact to ensure that the tribes adhere to minimum standards consistent with those formerly mandated by NIGC. There are others who also agree with the Commission.[23]

[23] May 28, 2007 Copley News Service article by James P. Sweeney, "New Deals worth Billions to 5 Tribes," quoting tribal attorney George Forman as stating:

"The state did not leave itself defenseless and paralyzed [under the 1999 Compact]."

"[Forman] said the state has the ability under the compact 'to ensure that tribes adhere to (minimum standards) consistent with those mandated by the National Indian Gaming Commission.' "

In sharp contrast, a substantial number of the comments made in the Task Force Report, though phrased in different ways, basically assert that the Compact does not authorize the SGA to adopt any regulation concerning MICS, at least if the regulation contains mandates.

Indeed, one could reasonably conclude that the authors of the Report believe that the SGA simply has no authority under the Compact to adopt regulations. This "nullity theory" essentially postulates that while it might appear on the surface that the compact (section 8.0) expressly grants a substantial degree of rulemaking power to the SGA (subject to review in the dispute resolution process) for purpose of fostering "statewide uniformity of regulation of Class III gaming operations," on closer analysis, they assert, it becomes clear that the only option open to the State is to negotiate individual compact amendments with each tribe.

Though we respect this view, we assert that the proper procedure for any tribe which rejects the State's role in developing uniform statewide regulations under section 8.0 would be to seek an amendment to its compact deleting or revising section 8.0. For instance, the 2004 Coyote Valley compact and the 2007 Yurok Compact both have a regulations section (section 9), but this section does not authorize the SGA to adopt uniform statewide regulations. Rather, those two compacts provide a process whereby the SGA may adopt a tribe-specific regulation.

Given the fundamental disagreement concerning the scope of SGA authority under the Compact to adopt a MICS regulation, CGCC staff has endeavored to ensure that CGCC-8 is drawn as narrowly as possible, while still protecting the integrity of tribal gaming.

8. CONCLUSION

In summary, CGCC-8 is an attempt to cooperatively develop reasonable standards and a protocol for increased state independent oversight of tribal gaming operations, in light of the *CRIT* decision. The adoption of the NIGC MICS as a baseline accomplishes a number of purposes, including use of a standard with which tribes have experience and are comfortable using. Increased state oversight will accomplish a number of worthwhile goals. It will give the State a basis for emphasizing publicly what has been an ongoing assumption: that many tribal gaming operations are run with efficiency and integrity. Further, it will allow the State to better ensure protection of its citizens who frequent tribal casinos and guarantee that its interest in the revenue sharing that is part of each compact is secure.

This article is included as Exhibit "E."

PART II. ASSOCIATION'S OBJECTIONS

1. AUTHORITY TO PROMULGATE MICS REGULATION

Regarding the legal authority of CGCC-8, the Commission received comments from Dry Creek, Paskenta, Rincon, Rumsey, Torres Martinez, and the Task Force. These comments contended that only a TGA is vested with the authority to promulgate and enforce rules and that the Association cannot displace a tribe's sovereign governmental powers. Comments argued that there was no authority for CGCC-8 in the compact.

Compact section 7.4.4 makes clear the SGA's broad right of access to documents, equipment and facilities:

> "Notwithstanding any other provision of this Compact, the State Gaming Agency shall not be denied access to papers, books, records, equipment or places where such access is reasonably necessary to ensure compliance with this Compact."

It is clear that the SGA may promulgate regulations concerning matters encompassed by Sections 6.0, 7.0 and 8.0 in order to foster uniformity of regulation of Class III gaming operations throughout the state. Further, it is clear that notwithstanding that the tribes have primary responsibility for administering and enforcing the Compact's regulatory requirements, the SGA has the right to inspect the Gaming Facility and Gaming Operation or Facility records and, notwithstanding any other provision of the Compact, the SGA is to be allowed access to papers, equipment and places where such access is reasonably necessary to ensure compliance with the Compact.

CGCC-8 is a regulation authorized under Section 8.4 to ensure uniformity in the regulation of matters encompassed by Sections 6.0, 7.0 and 8.0. It is an exercise of the SGA's authority under Sections 7.4, 7.4.4, 8.4 and 8.4.1 of the Compact.

See the Part 1 of this document, Section I.D., above, for further discussion of the State Gaming Agency's authority.

Some comments referred to the 2006 compact amendments, contending that the existence of a MICS-related section in the amendments proved that the State is aware of the lack of authority to implement MICS under the 1999 Compact. The four Memoranda of Agreement and one Letter of Agreement have the following language:

> ***Section 104. Minimum Internal Control Standards (MICS).***
> ***Sec. 104.1*** *So long as the National Indian Gaming Commission does not have the authority to adopt, enforce, and audit minimum internal control standards (MICS) for class III gaming devices and facilities and the State Gaming Agency does not have regulations in effect that contain internal control standards that are no less stringent*

than those contained in the MICS of the National Indian Gaming Commission, the Tribe agrees to maintain in full force and effect and implement minimum internal control standards for class III gaming that are no less stringent than those contained in the Minimum Internal Control Standards of the National Indian Gaming Commission (25 C.F.R. 542), as they existed on October 19, 2006, and, during that period, to submit to enforcement and auditing by the State Gaming Agency to ensure that the Tribe is in compliance with such MICS. This section is intended to supplement the Amended Compact and is not intended to supersede or negate any provision of the Amended Compact or any regulation that may be adopted by the State Gaming Agency.

These agreements contemplate that state regulations will contain MICS, but the agreements are merely an interim measure to keep the NIGC MICS as the standard until the state regulation (CGCC-8) is promulgated. There is no language indicating that this provision required additional authority be granted to the State. In fact section 104.1 specifically provides that:

> "[t]his section is intended to supplement the Amended Compact and is not intended to supersede or negate any provision of the Amended Compact or any regulation that may be adopted by the State gaming Agency."

Further, all compacts have an express provision that makes clear that "neither the presence in another tribal-state compact of language that is not included in this Compact, nor the absence in this Compact of language that is present in another tribal-state compact shall be a factor in construing the terms of this Compact."[24]

Some comments asserted that CGCC had no authority to conduct a full financial audit. CGCC-8 does not contemplate financial audits such as those found at 25 U.S.C. section 2710(b)(2)(C). In response to concerns raised by a number of tribes, the version of CGCC-8 approved by the CGCC (March 27, 2008) for consideration by the Association contained specific language eschewing such authority. In any event, CGCC later amended CGCC-8 subsection (h) to delete the term "full" and to restructure the subsection to clarify the intent of the regulation. CGCC-8 does not purport to and does not require financial audits be conducted by the SGA.

2. NEED FOR REGULATION

Comments were received asserting that there was no need for the State to adopt a regulation setting minimum internal control standards. (Rincon, Task Force.) Since *CRIT*[25] validated what many tribes had believed for years, that is, that the NIGC had no authority with regard to internal controls related to Class III gaming, the legal landscape never changed and tribes have been and continue to be self-regulating. The question has arisen as to what events have occurred which demonstrate that the State has a greater need for oversight. (Rincon, Task Force.)

[24] Compact Section 15.3.
[25] See Part 1, Section 3 above for further discussion of the *CRIT* decision.

The Commission believes that the *CRIT* court by deciding that NIGC did not have authority did not so much leave a "void" but rather clarified that Congress intended to leave Class III gaming regulation to the State and the tribes, including independent, non-tribal oversight of Class III gaming operations by the State. In response to widespread disagreement with that assertion and in response to language suggested by the Rumsey Rancheria, the Commission modified the Statement of Need and the Purpose section of CGCC-8 (subsection (a)) to reflect the other aspect of the need and purpose of the regulation: to provide an effective and uniform manner in which the SGA can conduct the compliance reviews contemplated in Compact Sections 7.4 and 7.4.4. The reviews include assuring tribal (and TGA) compliance with the requirements of Compact Sections 6.1 and 8.1 – 8.1.14.

The Commission agrees with the Task Force Report that the *CRIT* decision does not and cannot change the terms of the Compact. However, we disagree with the proposition that CGCC-8 attempts to amend the terms of the Compact. For reasons expressed in more detail in the section on Legal Authority, Part 1, Section 4 above, we believe that the adoption of CGCC-8 is well within the Commission's authority, as provided in the Compact.

The Commission listened to the comments throughout the Association process and deleted references to *CRIT* in CGCC-8 because it became apparent that the citations themselves were unnecessary, although the regulation itself is nonetheless a valid exercise of authority under the Compacts.

Comments also stated that tribes employ many persons as regulators and spend a great deal of money in self-regulation. (Task Force, Torres Martinez.) While no doubt true, that is not a reason for the State to not exercise its oversight authority given the outcome of protection to the integrity of the gaming operation and the need to assure gaming is conducted honesty and fairly. As explained above, compliance with the requirement that independent CPA testing occur, which measures the gaming operation's compliance with the tribe's internal control standards can be offset by performing the required yearly independent financial audits at the same time.

In the cases in which a tribe pays a flat fee[26] under amended Compacts, the Task Force report suggests that the State has no interest in securing its revenue share through the compliance reviews proposed in CGCC-8. There are, however, provisions of the MICS that are applicable even to a flat fee tribe. Proper accountability of the number of machines in operation is essential. The NIGC MICS contain detailed processes, which in themselves cause an accounting of the number of machines operated.[27] Further, the MICS contain standards relative to information technology that protect the integrity of the data produced.[28] Another MICS section relates to the preservation of records, which is essential to validate the tribe's assertion of machines operated.[29] Additionally, all those compacts implementing a flat fee system also contain unique compact obligations relating to gaming devices in which MICS are invaluable for

[26] There are only five such tribes.
[27] NIGC MICS, 25 CFR 542.13(h)(7), (10), (14) &(15); (m)
[28] 25 CFR 542.16(a), (b) & (f)
[29] 25 CFR5 42.19(k)

the tribe to carrying out its obligations. In the broadest sense, the NIGC MICS facilitate the credible operation of the gaming activity, which interest goes beyond the State's revenue share concerns, and is fundamental to the integrity of the entire gaming operation. (See also Section 6., "Unnecessary," below.)

Finally, some comments suggested that adopting the NIGC MICS by way of ordinance and providing for NIGC oversight eliminates the need for CGCC-8. (See Part 1, Section 6, (iii and iv) above and 7, Duplicative, below, for further discussion of this suggested alternative.)

3. REGULATION OR COMPACT AMENDMENTS

Some comments argued that CGCC-8 was viewed as an unauthorized or premature renegotiation of the Compacts and that separate government-to-government negotiations should be undertaken pursuant to Section 12.0. (Dry Creek, Rincon, Task Force.) Memoranda of Agreement were suggested as a separate negotiation.

From the Commission's perspective, Compact negotiations are not needed because the SGA's compliance review authority is clearly established in the existing Compact. While individual agreements could accomplish the same purpose, a uniform regulation adopted in accordance with the Compact provisions specifically authorizing such a regulation is much more efficacious. It ensures uniformity and fairness in SGA compliance review and, by taking into account the scope of individual gaming operations, assures a level playing field for all tribes and prevents arbitrariness. Both the tribe and the State are sovereigns. Each has sovereignty the other must respect; each has the right to demand that the other sovereign comply with its responsibilities and obligations mutually agreed to in the Compact.

It was also suggested that CGCC-8 is inappropriately and unilaterally supplanting the TGA with the Commission and that, since MICS were not discussed in the Compacts, they cannot be added now.

CGCC-8 does not usurp the primary role of the TGA in establishing and enforcing tribal MICS. CGCC-8 establishes guidelines and procedures for the SGA in exercising its authority under Sections 7.4 and 7.4.4 to independently ensure that the TGAs are carrying out their responsibilities under the Compact; in short, to ensure compliance with the Compact. Indeed, Compact Section 7.4 makes clear that notwithstanding the primary regulatory and enforcement role of the TGA, the SGA may inspect the tribe's gaming facility and gaming operation or facility records with regard to Class III gaming, subject to conditions outlined in Sections 7.4.1 through 7.4.3:

> "Notwithstanding that the Tribe has the primary responsibility to administer and enforce the regulatory requirements of this Compact, the State Gaming Agency shall have the right to inspect the Tribe's Gaming Facility with respect to Class III Gaming Activities only, and all Gaming Operation or Facility records relating thereto . . . "

The Compact provides the State with the authority (and responsibility) to review tribal standards to ensure compliance with the Compact. Neither tribal regulatory activities, nor NIGC regulatory activities can take the place of State Compact authorized compliance reviews.

See also Part I. sections 4, Authority, and 6 (iv) (Alternatives).

4. "UNFAIRLY DISCRIMINATORY"

The Task Force Report and separate comments from Rumsey indicate that because the State has not yet imposed MICS requirements in cardrooms, CGCC-8 is "unfairly discriminatory". See Part I, Section 6(ii), above, for a response to this comment.

5. "UNDULY BURDENSOME"

Comments from Cahuilla and the Task Force Report indicate that CGCC-8 is "unduly burdensome," but that adoption of the NIGC MICS or annual audits would not pose a significant economic impact because TGAs have already adopted the NIGC MICS and perform annual audits pursuant to IGRA. Revisions to CGCC-8, including the variance provisions, have been made to streamline the process and lessen any impact.

The Commission reiterates that CGCC-8 has not and does not increase any obligation on the tribes related to audits beyond that already provided for in Section 8.1.8 of the Compact.

While any outside review necessarily entails the use of some gaming operation staff time and resources, the Commission is fully committed to working with individual TGAs through consultation on a case-by-case basis to conduct compliance reviews in the most efficient manner possible and therefore minimize any impact on tribal gaming operations, TGAs, and California taxpayers. The Commission's ability to efficiently conduct meaningful compliance reviews depends to a large extent on the cooperation of individual TGAs and gaming operation personnel.

6. "UNNECESSARY"

Comments contended that CGCC-8 provides significant and unnecessary auditing by the Commission (Rincon) and that there has been no showing that tribes are conducting gaming without standards to justify the implementation of CGCC-8 (Cahuilla). Further, for those tribes that provide flat fee rather than percentages based upon net win, the State's interest in securing its revenue share through compliance reviews is lessened (Task Force).

Even for those tribes which provide a flat fee, the State has an interest in ensuring, through compliance reviews, that the TGA regulations and internal controls protect the gambling operation from criminal involvement or corrupting influences and maintain fair and honest gaming by both the operator and players.[30],[31]

[30] Compact, Preamble, Paragraph A and Section 1(b).

The NIGC has identified many instances of non-compliance in the limited number of MICS compliance reviews that they have conducted. See Part I, Section 6 (vi).

7. DUPLICATIVE

The Task Force Report and separate comments from Rumsey, Paskenta, and Torres Martinez argue that NIGC requires external auditing and if tribes adopt ordinances containing NIGC enforcement of MICS, then CGCC-8 is "duplicative."

As has been made clear at the Task Force meetings and as Chairman Shelton made clear at the March 27, 2008 Commission meeting, the CGCC has and will continue to make every effort to coordinate with the NIGC. However, SGA compliance reviews are not duplicative of NIGC reviews; they are a legitimate exercise of the State's authority under the Compact.

As NIGC Chairman Philip Hogen's April 17, 2008 written testimony to the Senate Indian Affairs Committee Oversight Hearing stated:

> "To put the regulation of tribal gaming in proper context, we need to appreciate that the vast majority of the regulation of tribal gaming is done by the tribes themselves, with their tribal gaming commissions and regulatory authorities. In many instances, where tribes conduct Class III or casino gaming, state regulators also participate in the [regulatory] process. NIGC has a discrete role to play in this process and is only one partner in a team of regulators." (Emphasis added.)

The SGA focus is Compact compliance; the NIGC has no interest in, nor authority with regard to Compact compliance. Further, to assert that because the NIGC has an oversight role with regard to internal controls the State should forbear from exercising its compliance review authority under the Compact is to ignore the State's role as a sovereign Compact signatory.

The Task Force Report points to Governor Schwarzenegger's letter of March 30, 2007 (attached as Exhibit "F") to the Senate Committee on Indian Affairs, quoting the governor as follows: "[California's] approach with the compacts and state oversight of internal controls has been to complement, rather than duplicate NIGC's activities."

CGCC-8 is not, as the Task Force Report asserts, "entirely inconsistent" with the Governor's message to the Senate Committee. In fact, it is not at all inconsistent. The fact that tribes have already put into place standards "at least as stringent as NIGC MICS" does not make CGCC-8 duplicative. Nor does the fact that a number of tribes have changed their gaming ordinances or entered into agreements purporting to grant the NIGC "authority" to monitor and enforce tribal

[31] Even tribes with flat fee payments revert back to the net win calculation after 18 years of lump sum payments to the State. The flat fee payments are based on so much per machine, and thus the number of machines is important, and the MICS provide a valuable tool for the state to verify the accuracy of the amount paid.

compliance with those standards. The loss of such authority as a result of the *CRIT* decision highlighted the need for the State to step into compliance oversight. The authority for such oversight has always existed in the Compact -- it was just not exercised.

As indicated above, CGCC-8 does not require financial audits, so there is no duplication of auditing or conflict with Sections 5.3(c) or (d) other than what is already required under Compact section 8.1.8.

As stated above, CGCC-8 does not duplicate TGA regulatory enforcement, as suggested by comments from the Task Force Report, Cahuilla, Paskenta, and Torres Martinez.

The Commission expects that the vast majority of gaming tribes have standards in place and run their gaming operation according to those standards in compliance with the Compact. However, that does not alter the State's clear authority to conduct compliance reviews. Further, from the perspective of the SGA, the State not only has the authority to conduct compliance reviews, but the responsibility as well. The public as well as the legislative and executive branches of state government have made that clear. CGCC-8 simply outlines a process and sets a uniform benchmark for such reviews. The State has not arrogated to itself any authority not already found in the Compact.

8. SPECIFIC REGULATORY LANGUAGE COMMENTS

Ralph LePera, an attorney representing Bishop Paiute, sent in a letter in May 2008 noting that:

> "Subsection (i) states that when on-site compliance review is conducted, the 'Tribe shall have sixty days . . . to respond to the CGCC draft report.' This appears to mean that all responses, whether accepting or rejecting the report, need to be received within 60 days. However, subsection (j) as written causes some confusion. Subsection (j) states 'If, after a 60 day review, the Tribe contests the draft report . . . .' This seems to contradict subsection (i) which says that all responses must be made within 60 days. Is subsection (j) an exception to the 60 day rule set out in (i)?"

Mr. LePera also commented that the second line of subsection (j) states:

> "'Upon notice by the Tribe of a disagreement and failure to resolve differences, the CGCC staff will finalize and deliver the report.' What if the Tribe never gives notice of a disagreement and failure to resolve differences? Does this mean that as long as the Tribe does not formally provide a notice of disagreement and failure to resolve differences that the report will be in so-called limbo?"

Subsection (i) and (j) has been revised to avoid any confusion and to clarify the process, and to more clearly distinguish between the *draft* Compliance Review Report and the *final* Compliance Review Report, in subsections (i) (1) and (2).

9. ALTERNATIVES TO MICS REGULATION

Tribal Task Force members proposed alternative language that contemplated either waiting for new federal authority for the NIGC or eliminating SGA compliance review via CGCC-8 if the tribe and the NIGC agreed to NIGC oversight through either MOU/MOAs or changes to Tribal gaming ordinances. Neither of these approaches takes into account the State's sovereignty as a signatory to the Compact. The SGA authority to inspect the gaming facility and all gaming operation or facility records relating thereto (Section 7.4) and the SGA's authority to be granted access to papers, books, records, equipment or places where such access is reasonably necessary to ensure compliance with the Compact (Section 7.4.4) are derived from the Compact. They are not and cannot be made dependent upon the statutory authority of the NIGC, or upon other arrangements between the NIGC and individual tribes. The State's authority is not secondary to the federal government's non-existent authority over Class III gaming operations and the State's is not obliged to delegate its authority to NIGC.

Dry Creek suggested a non-adversarial dispute resolution process. Changes to subsection (n) of CGCC-8 address those concerns by clarifying that the tribe has the option of seeking review by the full Commission before invoking the compact dispute resolution process. As CGCC-8 derives its authority from the Compact, the dispute resolution process in CGCC-8 follows that found in the Compact. However, there is nothing in CGCC-8 that would *preclude* the State and any tribe from agreeing to binding arbitration on a case-by-case basis, depending on the facts and circumstances of the dispute.

One alternative suggested (Elk Valley, Paskenta) was to follow the oral statement made on September 4, 2008 by the Attorney General/Bureau to individually consent to oversight. The Attorney General's suggestion is too vague, and it is unclear in what form the consent would come or how it would be enforceable and whose consent – the State of the NIGC?[32] Dry Creek also suggests following a "safe harbor" approach by *recognizing rather than mandating* the NIGC MICS as a national standard.

CGCC-8 does *not* require any tribe to adopt the NIGC MICS in carrying out its responsibilities under Compact Sections 6 and 8. CGCC-8 requires that whatever internal controls standards a tribe may choose to adopt meet or exceed the requirements of the NIGC MICS. Further, CGCC-8 provides for variances (subsection (l)) and for consultation between the SGA and individual tribes and the Association as a whole regarding the effect of changing technology on compliance matters (subsection (m)).

10. RESPONSE TO "SAFE HARBOR" ALTERNATIVE

Dry Creek Rancheria asserts that the State should reach statewide uniformity through cooperative action with the Association without mandating conduct or amending the compacts. The Tribe contends that an example of that is uniform regulation CGCC-2 related to

[32] It also appears that this September 4, 2008 oral comment from the Attorney General/Department of Justice may have been superseded by the formal written comment dated September 29, 2008.

registration of qualified bondholders, which did not mandate that it be followed, but provided that if followed, the tribes and their bondholders would be deemed to be in compliance with the compact. Dry Creek Rancheria argues that this process, even though voluntary, provided complete assurance ("safe harbor") that preserved the regulatory integrity of those financings. However, the CGCC-2 example is not comparable to the CGCC-8 situation. First, CGCC-2 was agreed to because it substituted a process that was easier to accomplish than the more complicated requirements of the Compact. Although CGCC-2 does find that TGA shall be "deem[ed] to satisfy suitability standards of the Compact" if the applicant meets the requirements for registration under the regulation, it allows a more streamlined process for a determination of a Finding of Suitability for a Financial Source. By contrast, CGCC-8 is not relaxing a Compact requirement, but is rather imposing a uniform requirement and thus very different than what occurred with CGCC-2. Further, although Findings of Suitability for Financial Sources are important, the process dealt with in CGCC-2 is not integral to the process of protecting the integrity of gaming. The minimum internal controls of CGCC-8 are integral to gaming and cannot be voluntarily agreed to with no ability on the part of the State to ensure compliance.

11. RESPONSE TO (1) THE VOTE BY THE DEPARTMENT OF JUSTICE, BUREAU OF GAMBLING CONTROL AT THE SEPTEMBER 4, 2008 ASSOCIATION MEETING AND (2) THE FOLLOW-UP LETTER FROM INTERIM BUREAU CHIEF MATT CAMPOY, DATED SEPTEMBER 29, 2008

At the September 4, 2008 meeting, the Department of Justice, Bureau of Gambling Control voted:

> "Yes to oppose the regulation CGCC-8 with the following comments:
>
> 1) We encourage tribes to consent to oversight; and
>
> 2) If the tribes are unwilling to consent, we would generally support the idea of the application of the federal standards without modifications."[33]

This Bureau comment is too vague to permit an effective response. In what form would the consent come, with whom and in what kind of vehicle? How would it be enforceable and would the State need a waiver of sovereign immunity from each tribe? CGCC-8 follows the NIGC MICS as closely as possible, given that certain things simply cannot follow the federal procedure. For instance, it would be nonsensical to appeal a variance to the CGCC-8 MICS to the NIGC Chairman. The "safe-harbor" language mentioned by Paskenta is suggested by the September 29, 2008 follow-up letter from the Bureau of Gambling Control. In that letter the Bureau suggests the following language in (b)(1):

[33]See the letter from Paskenta advocating this position also.

"In recognition of the importance of adequate internal controls to the State, the State Gaming Agency regards either of the following to be a material breach of the Compact:

(A) An unreasonable failure to maintain written internal control standards that are at least as stringent as the MICS;

(B) An unreasonable failure to afford the Bureau of gambling Control access to, and an opportunity to copy, the Tribe's written internal control standards or amendments thereto when requested."

That suggested language attaches a condition of unreasonableness to any alleged breach. That, in turn, suggests that there can be conditions under which failure to adopt conforming MICS may be reasonable. While it seems obvious that not every failure to adopt or implement conforming MICS would constitute a material breach (as, for example, when a TGA adopts MICS that fail to meet or exceed the NIGC MICS in minor, inconsequential respects), the use of the term "unreasonable" in subparagraphs (1) (A) and (B) of the Bureau letter is too nebulous to effectively differentiate a material from an immaterial breach. At what point on what scale would a failure stop being reasonable and become unreasonable? The classic purpose of an administrative regulation is to interpret or make specific a provision of the underlying enactment, typically a statute, but in the case of CGCC-8, the Compact. It does not seem prudent or productive to adopt a uniform regulation which contains such a combination of ambiguous terms, thus increasing the likelihood of litigation. .

Moreover, whether the SGA regards "unreasonable" noncompliance as a material breach of the Compact is not dispositive. Only the Governor is empowered to determine the State's position and enforce tribal obligations under the Compacts. Therefore, the SGA's view concerning what is a reasonable or unreasonable violation of CGCC-8 would be subject to the Governor's review and thus the language is ineffective. Additionally, how could either condition be a material breach when the language suggested in paragraph (b) does not require the tribes to have MICS, but rather is just the SGA "construing" the provisions of the Compacts as imposing certain obligations on the tribes?

Further, the MICS are a subset of a larger regulatory universe that the TGAs are required to adopt and implement for casino operation. The suggested draft language deems the obligation for adopting "internal control standards" to be satisfied if the standards meet or exceed the NIGC standards for MICS. However, it is not clear that the NIGC MICS are the standards. The term "internal control standards" is not defined in the Bureau's text and could be susceptible to more than one interpretation in the context of the Bureau's suggested language. On the one hand, it could be argued that the term is restricted to those subjects expressly covered by the NIGC MICS and CGCC-8. On the other hand, it could also be argued that it covers anything that could possibly come within the ordinary meaning of "internal control standards." From an interpretive standpoint, ordinary meaning is preferred by the courts, in the absence of clear intent to ascribe a limited technical meaning to language. When terms such as "internal control standards" are used in their limited technical sense, a definition should be added to the regulation to make clear the intended meaning. Otherwise a much broader interpretation could be applied in litigation.

If no minimum standards are set or defined, as can be inferred from the Bureau's letter, the issue of whether or not there is a material breach becomes even more difficult and could cause more problems than the "safe harbor" approach solves.

Finally, paragraph 2 of the Bureau's comment is surplusage because nothing in the regulation could be construed to preclude the State and a tribe from agreeing to binding arbitration under Compact section 9.2, but by adding this paragraph, it makes it appear as though arbitration is the preferred method, thus undermining Section 9.