NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION

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Submitted electronically to: http://www.regulations.gov

Re: Docket ID: BIA–2016–0007, Comments on ANPRM for 25 CFR Part 140

The Native American Financial Services Association (NAFSA), a 501(c)(6) nonprofit trade association representing tribal financial services, submits these comments in response to the Department's Advance Notice of Proposed Rulemaking (ANPRM) issued December 9, 2016. NAFSA appreciates the opportunity to submit comments prior to proposed rulemaking. We have provided answers to the questions set forth in the ANPRM with respect how and whether 25 CFR Part 140 should be updated by the Department. NAFSA looks forward to additional dialogue and opportunity for input on this project through government-to-government consultation.

1. **Should the government address trade occurring in Indian Country through updates and why?**

   Yes, 25 CFR Part 140 is antiquated and needs to be updated to reflect modern economic practices and current federal law and policies. These regulations have not been substantively updated since 1957, which means the focus and verbiage of the regulations are severely dated and at odds with the federal policy enunciated in the 1970's of promoting and supporting tribal self-government. For example, the regulations still require federal licensing of all trade on reservation except for trade conducted by "fullbloods." The regulations speak of "appointing" traders, which is no longer relevant. Part of the regulation implements a federal law repealed in 1996 to prohibit gambling activities. Additionally, in practice very few reservation businesses have federal licenses under 25 CFR Part 140 and certainly the BIA has not exercised its authority under the regulation to control pricing in recent decades.

   In following the principle of self-determination, the regulation can and should recognize the tribe's authority to determine with whom (and how) it will do business with traders on Indian land. The legislative history of the 1834 Indian Trader law supports tribal self-regulation of trade. The House reported with respect to regulation of trade with and among tribes, "each tribe, by adopting those laws as their own, and establishing competent tribunals, may relieve us from the burden of executing them, and it is hoped that this will be done…such regulations must be made either by the United States, or by the tribes. They will be more satisfactory if made by them, than if made by us, and it must be our desire to do nothing for them which they can do for themselves." H.R. Rep. No. 23-474 at 19 (May 20, 1834). It is long past time to bring tribal self-determination to Indian trade and commerce. Tribes can regulate commerce within their reservations with more certainty and efficiency than the current, outdated Indian Trader regulations allow.

As tribes enter the field of e-commerce, it is critical that federal laws keep pace with the rapidly digitizing world and the growing ability of tribes to conduct business from tribal lands with companies and consumers across the United States and around the world. A modern Indian trading law must reflect the market realities of a closing digital divide and the nature of online transactions that originate on tribal lands with distant parties. NAFSA member tribes originate approximately $2 billion in loans each year via the internet and work closely with service providers off reservation. Nimble federal regulation of these relationships is important to the long term viability and sustainability of web-based enterprises on tribal lands.

NAFSA submits that the regulations can be updated in a manner that does not undermine tribal sovereignty, but rather empowers tribes and clears the way for tribal regulation to take place. Updates to the regulations can and should reflect dual purposes of supporting tribal economic development and promoting tribal self-government. The Department did this with the recent updates to 25 CFR Parts 162 and 169. The foundational principles that inspired and supported modifications to the leasing and rights-of-way regulations apply with equal, if not greater, force with the Trader regulations. In fact, the Department cannot achieve its stated goal of promoting healthy, vital tribal economies by only addressing leasing of Indian land; the Department must go further to ensure its policies and principles are consistent across the regulation of all trade and commerce in Indian Country.

2. Are there certain components of the existing rule that should be kept and, if so, why?

Yes. Aspects of the prohibition against BIA employees engaging in business and trade with tribes remain prudent to prevent conflicts of interest in the exercise of the federal government's trust responsibility. Also, any licenses that were issued to businesses under 25 CFR Part 140 should be grandfathered and continue to be valid, but subject to further regulation by the tribe.

3. How can revisions to the existing rule ensure persons who conduct trade are reputable and that there are mechanisms in place to address traders who violate Federal or Tribal law?

Again, the suggestion that the federal government should protect Indians from disreputable traders is an outdated and paternalistic notion that does not have a place under a policy of tribal self-determination and self-government. Tribes are capable of regulating and policing trade within their communities. Regulation updates should simply acknowledge tribes' authority and responsibility.

To require a federal license for Indian trade adds an unnecessary level of administrative burden and, as such, has a chilling effect on both trade and tribal self-determination. NAFSA supports any changes in federal trader regulations that promote free trade, local tribal regulation and respect tribal sovereignty. As the Department sought to achieve with its updates to 25 CFR 162 and 169 (leasing and rights-of-way regulations), it should update the Trader regulations to limit BIA's involvement in regulating business in Indian Country and defer to tribes to manage their own affairs in trade and commerce. Tribes are in a better position to know what is in the best interest of their communities. Updates to the Trader

regulations should require the BIA to recognize and acknowledge tribal laws regulating business activities on its land. As was done with 25 CFR Parts 162 and 169, the regulations can allow tribal laws to supersede or modify 25 CFR Part 140 provisions, as long as certain conditions are fulfilled (*e.g.*, the tribe notifies BIA of the modifying or superseding effect and/or the tribe's regulations meet minimum standards).

4. How do tribes currently regulate trade and how might revisions to 25 CFR Part 140 help tribes regulate business in Indian Country?

Many tribes are regulating business and commerce through their own laws. Tribes commonly address safety, quality, standards, environmental protection, taxation and other matters by their regulations. In fact, Tribes are in a better position to regulate trade and commerce on their land in a manner that the federal government simply cannot. NAFSA member tribes develop business licensing laws for lenders, comprehensive lending codes and independent regulatory commissions to oversee code revisions and complaint resolution. This regulatory structure goes above and beyond federal requirements and demonstrates credibility and transparency within our industry. Tribes understand the particular needs of their community, the impact of competing regulation from state and local governments, and the general market conditions which would attract and retain business on their lands. Therefore, the Trader regulations should defer to tribal laws and authority to the maximum extent.

5. What types of trade, and what type of trader, should be subject to the regulations?

All commerce on Indian land should be covered by 25 CFR Part 140. This should include activities related to e-commerce, oil, gas, minerals and natural resources. Trader regulation definitions should be modernized to encompass all actors and activities, including web-based interactions, in relation to Indian commerce, and particularly to permit tribes to regulate (and tax) non-Indian economic activity on their lands. The Secretary of Interior has broad authority under the Indian Trader Statute to do this. The Indian Trader Statutes are a delegation of Congress's power to regulate commerce with the Indian tribes, and provide broad regulatory authority to the Department of Interior. The statute at 25 U.S.C. 262 covers "any person desiring to trade with the Indians" and authorizes any regulations Interior "may prescribe for the protection of said Indians."

Updates can also address tribal preference laws. As the BIA stated in 25 CFR 162, "Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe's specific preference in accord with tribal law ensures that the economic development of a tribe's land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members."

6. How might revisions to the regulations promote economic viability and sustainability in Indian Country?

Regulatory change is absolutely necessary to promote the sovereign authority of tribes to create a fiscal environment to stimulate the flow of investment, technology and services to

Indian Country. To that end, updates to the Trader regulations should address the following areas which are critical to developing sustaining economies in Indian Country: 1) enable tribal regulatory authority and authorize any person to engage in trade within Indian reservations pursuant to the laws of the tribal government; 2) provide clear rules for tribal jurisdiction over business activity; 3) provide clarity and certainty as to the taxation of commerce in Indian Country; and 4) delete regulatory burdens that are not necessary for BIA to meet its statutory and trust responsibilities and include provisions supporting tribes' sovereign rights.

The regulations should address the discriminatory effect of singling out commercial activity and natural resource development in Indian Country with dual taxation. Assessment of State and local taxes obstructs Federal policies supporting tribal economic development, self-determination and strong tribal governments. Furthermore,, the presence of federal regulatory pronouncements with respect to state taxing authority has ever-increasing importance to protecting on-reservation commercial activity. As the Department did with its recent update to regulations governing leasing and rights-of-way on trust lands, by updating the Trader regulations it can reaffirm the *Warren Trading* principles that, ''Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders.''

State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency and territorial autonomy. An important aspect of tribal sovereignty and self-governance is the power to tax. The regulations should underscore and promote this sovereign right and to that end, preempt state and local tax of natural resource development, commercial activity and personal property on tribal trust land. State governments are increasingly imposing taxes on severance of natural resources, retail sales, and property. Tribal governments face a losing proposition when forced to collect state taxes: if they impose a tribal government tax, then dual taxation drives business away. Or, tribes collect insufficient (or no) taxes and suffer inadequate roads, infrastructure for economic development, schools, police, courts and health care. To add insult to injury, reservation economies are funneling millions of dollars into state treasuries who spend the funds outside of Indian country; state and local governments are not investing in tribal communities commensurate with the tax revenue they receive from economic activity on our trust lands. At the same time, tribal governments have increasing responsibility to fund tribal community services, as well as the very infrastructure that is creating the tax-generating activity. This dilemma is fundamentally unfair to tribal governments, undermines the Constitution's promise of respect for tribal sovereignty, and keeps Indian reservations the most underserved communities in the nation. NCAI recently passed Resolution SD-15-045: "Urging the Department of Interior to Address the Harms of State Taxation in Indian Country and Prevent Dual Taxation of Indian Communities," which NAFSA fully supports.

The very possibility of an additional State or local tax can make some businesses in Indian Country less economically attractive, further discouraging development in Indian country. Indeed, uncertainty as to taxing jurisdiction and one's ultimate tax burden is seen as the single greatest impediment to non-Indian investment and location of businesses in Indian Country. This uncertainty forces tribes to structure their economies in the manner most likely to limit the ability of the state to enforce its tax, rather than in the manner that makes the best

business sense. For their part, non-Indian investors and partners are rarely willing to endure the expense and delay of obtaining certainty on taxation in Indian country. Tax rulings can be obtained from many state taxing agencies, but they are fact-specific and dependent on case law underpinnings that are notoriously unreliable, or on the terms of negotiated state-tribal compacts with expiration dates that may not afford the investor sufficient security over the life of the project. Even when a tribe ultimately prevails, litigation is often necessary to establish state tax exemption whenever a non-tribal partner or investor is involved. Numerous inefficiencies result from this, including the direct cost and delay caused by extended litigation, as well as the chilling effect on both outside and tribal investment.

7. What services do tribes currently provide to individuals or entities doing business in Indian Country and what role do tax revenues play in providing those services?

Tribes certainly can levy sales and use taxes, hotel occupancy taxes, cigarette taxes, utility taxes and other excise taxes on economic activity in Indian Country. However, this source of revenue is extremely limited (if at all available) and generally viable only upon agreement with state and local taxing jurisdictions. At the same time, tribal governments have increasing responsibility of not only their citizens, but also businesses located within tribal communities. Tribes provide services for public safety, environmental services, infrastructure (roads, water, sewer), judiciary, licensing/permitting and so on. For their citizens, the essential government services also include housing, health care, public facilities, community support, legal assistance and so on. The tax revenue is never enough to cover all of these expenditures. The imposition of state and local taxes undermines the tribe's ability to fully fund these essential support services through their own tax revenues. Moreover, the failure of states to reinvest the tax revenue they receive from Indian commerce back into Indian Country does serious harm to tribes, their citizens and the neighboring communities. This is harm that the Department should address through reform of the Trader Regulations.

We appreciate your consideration of these comments and look forward to continuing government-to-government consultation on this very important undertaking to address Indian trade and commerce.

Sincerely,

Gary Davis
Executive Director
Native American Financial Services Association