

## Why Paycheck Protection Program should be opened to tribal gaming enterprises



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On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the economic crisis caused by 2019 novel coronavirus (COVID-19). Title I of the CARES Act, the Keeping Americans Paid and Employed Act, creates a Paycheck Protection Program (PPP) under Section 7(a) of the Small Business Act to fund forgivable loans to businesses, including tribal business concerns, employing not more than 500 persons at any single location.

The PPP, supported with a \$349 billion appropriation, is a central pillar of Congress' effort to help wage earners survive the COVID-19 crisis and to avert a collapse of the U.S. economy. Unfortunately, in an interim final rule issued April 2, 2020, the Small Business Administration (SBA) incorporated into the PPP regulations a 1953 rule, now found at 13 C.F.R. § 120.110(g), that bars Section 7(a) loans to gambling businesses.

Many tribes rely on revenues from gaming enterprises operating pursuant to the Indian Gaming Regulatory Act of 1988 to fund government services. Tribal gaming enterprises are often major employers in the rural areas in which they operate. For the following reasons, SBA should reverse course and clarify that gaming enterprises that otherwise meet PPP criteria are eligible borrowers:

1. Because section 1114 of the CARES Act expressly authorizes the SBA to adopt regulations to implement the PPP, SBA is bound by existing regulations only to the extent that they incorporate statutory requirements.
2. Because neither the Keeping Americans Paid and Employed Act nor Section 7(a) of the Small Business Act, to which the PPP is appended, prohibits Section 7(a) loans to gambling businesses, the Section 120.110(g) gambling prohibition need *not* - and should not - be included in the Keeping Americans Paid and Employed Act regulations.
3. The Section 120.110(g) prohibition against loans to gambling businesses originated in a Loan Policy Statement adopted by the Loan Policy Board of the Small Business Administration on November 16, 1953 (see 19 Fed. Reg. 5440, August 26, 1954). The radically changed social and economic status of gaming in the U.S. since 1953 provides relevant context in assessing whether the prohibition should be extended beyond its original purposes.
4. Tribal gaming enterprises, unlike other gaming businesses, advance a congressionally declared federal policy "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Indian Gaming Regulatory Act, 25 U.S.C. § 2702(1).

*The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.*

5. While traditional Section 7(a) loans are intended to broadly support small businesses by providing capital for “plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital,” their impact on employment is necessarily *indirect, prospective and speculative*.
6. By contrast, the *primary* purpose of the Paycheck Protection Program and the Keeping Americans Paid and Employed Act, as their titles make clear, is specifically to protect the livelihoods of *currently employed* but imperiled wage earners in a time of dire emergency.
7. Persons employed by gaming enterprises are not less deserving of assistance than individuals employed in other sectors of the U.S. economy. Their need is no less acute. The dollars they spend are just as important to their communities. There is no justification for a rule that discriminates against them.

As of April 8, 2020, U.S. President Donald Trump’s administration had proposed that Congress supplement the PPP with an additional \$250 billion. If the SBA fails to act in the meantime, Congress should clarify the eligibility of tribal gaming enterprises otherwise meeting PPP criteria.

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