



## American Indian Alaska Native Tourism Association

Webinar: **CARES Act of 2020: Business Support Programs for the Cultural/Tribal Tourism Sector**

Presenter: Pilar Thomas, Partner at Quarles & Brady, LLP

### Questions and Answers Session

#### PPP Loan Program

Note that the PPP and EIDL loan programs have received additional funding effective April 24. The PPP loan program received an additional \$300 billion, and the EIDL loan program received an additional \$50 billion. In addition, the EIDL grant program received an additional \$10 billion.

New applications for both programs will be accepted starting up Monday, April 27.

#### ***Do Section 17 businesses apply on their own or as part of the tribal ask?***

A tribal owned Section 17 company is eligible for all these programs on its own, except for the Title V program. So if you're less than 500 you can apply for the Payroll Protection Program (PPP) loan, qualify for the payroll tax credit. If you're more than 500 then you qualify for Title 4. You don't need to get Tribal approval or go through the Tribe for any of those other programs.

#### ***When do the funds in PPP need to be used by?***

You have until June 30, 2020 to apply, which is coming up soon. There is no set time within which you have to use the loan funds. But, if you get a loan today, you can only request loan forgiveness for the use of loan funds during the eight-week period after you receive the loan. You have to show your expenses for payroll and other allowed expenses. If you do not want to have it forgiven, and you want to have the money at a 1% interest rate for two-years, you still are limited on what you can use it for. It will only cover cost through the end of the year.

#### ***Is the funding for sole proprietorship 100% forgivable?***

The loan can be up to 100% forgivable, depending on whether you meet the requirements. It's the same rules for everyone. You have to spend 75% on payroll, which is what you would pay yourself, 25% on other expenses. So the sole proprietors are subject to those same splits and there is some additional information from the Small Business Administration (SBA) that just got published in their Interim Final Rule about the definition of payroll costs and processing sole proprietor applications. They will look at net income, presuming that is how the sole proprietor is paying themselves is out of their net income. And they would be looking at 2019 net income. So, if you are the only employee and you're still employed, and as long as you meet the forgivable requirements, it would be forgivable.

#### ***Several small businesses with less than 3 employees have been having major complications on applying for the SBA PPP. Need more support and technical assistance for the small Native businesses.***

One of the things we would encourage you to do is to send comments to the SBA. The Interim Final Rules have been published now in the Federal Register and now they are open for comment until May 15. We would strongly encourage you to provide comment to the SBA on how those rules are working. So if you are running into issues with your bank, which many people are, and the bank is requiring information that doesn't appear to be required by law, which some of them are doing, or is requiring more information that is what is required by regulation, we certainly encourage you to comment on the rules. The Native American Contractors Association has put out some comments, a couple of my clients have also commented as well, but certainly now that we have had some experience, it will be helpful to follow up with the SBA in the comment period on the type of experience you are having and asking them to clarify in their rules to fix the issues you have. So, if you're being asked to provide certain types of information that you do not have – some banks are requiring an 941, and you do not have a 941, then we are not going to give you a loan – the law allows you to provide



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different information other than that. You can provide a payroll register, your financial statements, your bank statements. So, there is a list of types of documents in the law and in the guidance that banks are not accepting. So that would be ripe for comment to the SBA that you are having those kinds of application and processing challenges.

***Difficult for Tribal businesses who do not have a strong lender relationship. Banks are focusing on clients that had previous loans through that bank. PPP or EIDL have not reached our Tribal businesses. Will CDFIs become loan vehicles (Pelosi mentioned this for Native American businesses).***

The Native CDFI group is supported by NAFOA, NCAI, NACA submitted comments to Treasury and the SBA that Native CDFI should be approved lenders for the PPP and EIDL programs. The CARES Act allows the SBA to bring on new lenders who meet some minimum requirements. The SBA did in fact open that up so they have a portal of new lenders applying to become approved lenders. Native CDFIs made the argument that many of them are already "certified" by Treasury under the Native CDFI program and so they should automatically be approved lenders. To my knowledge, the SBA has not adopted that view so they have not made Native CDFI approved lenders so I can verify that with the Native CDFI group. I do know Speaker Pelosi in one of her draft bills there is list of what they want to see in the PPP is that half of the new money go to community banks and CDFIs and she explicitly included Native CDFIs in that. So we will have to see what happens with that legislation. Another opportunity to comment to the SBA in this comment period about incorporating Native CDFIs into the SBA's lender program.

**NOTE:** The new legislation, which was enacted Apr. 24, includes a \$30 billion set aside for "community financial institutions" which include community development financial institutions (such as Native CDFIs), and minority depository institutions (such as tribal owned banks). NAFOA has posted a list of tribal banks, and Native CDFIs.

***So you have until the end of the year to use the funds, correct? If you don't use the funds, can the bank send the money back to the SBA or do they have to use the remaining funds to make the loan at 1%?***

You will be issued the loan with a term of 2 years at a 1% interest rate. You can use the money at any time, but only for those costs allowed under the law. If you ask for it to be forgiven (after the first 8 weeks of the loan - see Q. 2 above), then you'll have a reduced amount to repay. If you do not use the funds at all, then you can either prepay the loan, or pay it back over the 2 year period.

***What other resources are available to assist the small businesses besides SBA?***

Of course, the USDA. I would encourage you to reach out to the Minority Small Business Development Administration and Commerce, you have the Inter-Tribal organizations – National Center for American Indian Enterprise Development who can provide technical assistance on the types of programs that are available. Certainly, there are some other federal programs that could be available to you beyond the USDA. The BIA for example has the Loan Guarantee Program and other parts of Commerce that have grants and other business development efforts on the federal side at least.

***I thought you said that 50% must be spent on payroll. Is it 75% for everyone?***

The SBA split is at least 75% of the PPP proceeds have to be spent on payroll costs. And that is salaries plus benefits. And the other 25% can be spent on rent, utilities and interest on your debt. So, if you get a \$1M loan through the PPP program, \$750,000 has to be spent on payroll costs and the other \$250,000 can be spent on



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rent, utilities and interest on your debt. You can, of course, spend more than that on payroll costs, but it has to be at least 75% on payroll costs. The 50% split is for the Tax Credit. So, on the Tax Credit you get up to a 50% tax credit on employee wages up to \$10,000; so up to \$5,000 per employee you would get a tax credit for. But you cannot do both. You can get either the PPP loan or you can get the Tax Credit. So, one of the things I would encourage Tribal businesses to do is the math. Figure out which program works best for you from an economic standpoint. Now, if you're not eligible for PPP then the Tax Credit or Tax Deferral is your best program. But if you're eligible for both, which if you're under 500 employees and not gaming and not lending, then I would encourage you to the math to see which one of those programs will work best for you, because you can do one or the other.

#### ***Do I have to use my current bank to apply for the PPP?***

No. So any SBA approved lender can make the loan. But one of the things people are experiencing is that many of the banks will not do a loan with a borrower that is not already their customer. The bank's primary rationale is they have a fiduciary requirement to "know their customer." They have been prioritizing processing applications for people who 1) already have a lending/borrowing relationship with them or 2) have some other type of account (demand deposit, checking, savings account, etc.) with them. There is no requirement under the law or the regulations that you only apply with someone you already bank with. But the banks are effectively imposing that and there was a lawsuit that was filed in Maryland, Bank of America was not taking applications from non-customers and so that lawsuit is pending in the state of Maryland. From a processing standpoint, what we're hearing is that Tribal enterprises that do have existing relationship, the bank is taking their applications, they're working with them, they're getting them money. Some of the banks are being incredibly helpful with the tribal enterprise providing a lot of technical assistance so I would encourage that. But there is no requirement but in experience, that is the easiest and fastest way to get the application approved.

#### ***My business is owned by my tribe. Would I qualify for anything besides asking my tribe through the Title V Stabilization?***

The business itself, even though it is owned by the Tribe, if it is operated separately or is a separate legal entity (even if it is part of the tribe itself); for the PPP loan, if it is a separate legal entity, it can apply directly for the PPP loan. You have to disclose that you are owned by the tribe, and that is fine because you are eligible. For the Tax Credits or Tax Deferrals – assuming that you will be submitting your own payroll tax return (IRS Form 941) under your own Employee Identification Number (EIN) then you would be able to take the tax deferral or the tax credit. You can't do both – it's one or the other. Although you can defer if you have the tax credit. Cannot do both PPP and tax credit. On the Title V you will have to go through the tribe since that is where the funding is going to go from Treasury (see below). But for everything else, if you are a separate legal entity with a separate EIN, you're eligible. However, if you are legally a part of the tribal government this answer is less clear. This came up at the Treasury consultation we had on April 14, 2020. Some people asked the question: "what if my tribal business is officially, legally a part of the government – so the C-Store or smoke shop, I do not have a separate legal entity and I do not have a separate EIN." Treasury is taking comment on that and they are interested in hearing the circumstances where tribal business might be a part of the tribal government. Treasury did point out that to qualify for the tax credit you have to show you are in a trade or business. So, if the C-Store wanted to take a tax credit for its employees, the tribe would have to separate those employees out. If the housing authority, again arguably, engaged in a trade or business; or some tribes have their casino enterprise under their government – again a trade or business. So there might be some paperwork and



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certainly getting clarification and commenting to Treasury on how you would separate those employees so you could take a tax credit on the gaming employees or the c-store employees and separate those employees from the traditional government employees.

### Title V CRS Fund (\$8 billion for tribal governments)

**UPDATE:** Several tribes have sued the Department of Treasury for taking the position that Alaska Native Corporations (ANCs) are also eligible for funding from the Title V program. The Court has not yet issued a decision. Treasury has also advised the Court that funding disbursements will be delayed until at least Tuesday, April 28.

#### ***What “certification” is required to be eligible for the Government Stabilization funds?***

U.S. Department of Treasury (Treasury) has put up on its website a link to the certification form. The basic information that is supposed to be submitted by tribes, is the name of the tribes, total tribal membership, land size (include all lands held in trust, allotted lands, fee lands and restricted lands), total number of employees and all its businesses (51% owned by the tribe), and total fiscal year 2019 expenditures (aggregate). The form must be signed by the CEO, Chairman, President, lawful representative of the tribe signs the form certifies that the information they are presenting is accurate. And there is additional information Treasury is requesting including a DUNS number, financial institution. Treasury will be disbursing the funds directly to the Tribes, so it will not be going through the BIA, BIA 638 contract, or compacting agreement. It will be coming directly from Treasury. Tribe has to tell Treasury where to send the money. Some Tribes have Treasury accounts already set up – they may have Treasury trust funds or have it sent to their bank accounts. Forms have to be submitted by tonight, April 17 no later than 11:59 PM Eastern Daylight Savings Time.

#### ***Do Section 17 businesses apply on their own or as part of the tribal ask?***

For Title V, Treasury and Interior have taken the position that Tribes should submit information all its businesses. Separate Tribal business won't apply, except ANCs are eligible to apply. Title 5 explicitly says the tribal governments would request the funding. So, if you're Section 17 and you want to get access to the Title 5 Stabilization Funding you'll have go through your tribe to get it. But the Section 17 is also eligible for all these other programs on its own, so if you're less than 500 you can apply for the Payroll Protection Program (PPP) loan, qualify for the payroll tax credit. If you're more than 500 then you qualify for Title 4, you don't need to get Tribal approval or go through the Tribes for any of those other programs.

#### ***Total expenditures include businesses?***

Have not received a firm answer from either Treasury or U.S. Department of Interior (Interior) on whether total expenditures include tribal owned businesses. There are lots of reasonable interpretations of what that term means. Some tribes and some attorneys believe total expenditures can just be government expenditures; Treasury and Interior have provided verbal guidance that it should include all expenditures. So, it is unclear. In the law, the Fiscal Year 2019 expenditure number creates a baseline for what is considered an increased expense. Question to ask your attorney: “What does that baseline mean?” It is unclear what Treasury is going to use it for. There is an anticipation that some of the other information is going to be used for a formula that determines how much tribes get so it is unclear how the expenditure number will work in that formula, if at



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all. But in the law, FY 19 expenditures represents a baseline of how much has been spent by a tribe and maybe its enterprises and what's the increase that will be spent because of the COVID-19 Public Health Emergency.