October 6, 2020

Casey Lozar
Director, Center for Indian Country Development
Federal Reserve Bank of Minneapolis
100 Neill Avenue
Helena, MT 59601

Re: Main Street Lending Program

Dear Mr. Lozar:

This letter responds to your request on behalf of the Center for Indian Country Development of the Federal Reserve Bank of Minneapolis for the Office of General Counsel, National Indian Gaming Commission, to review requirements of the Federal Reserve Board's Main Street Lending Program (MSLP). The MSLP supports small and medium-sized businesses, including tribal gaming operations, by facilitating lending during the current period of financial strain caused by the COVID-19 pandemic. Through the MSLP, the Federal Reserve purchases a 95% interest in eligible loans while the lender retains a 5% interest and continues to service the loan. The Federal Reserve obtains the same rights as the lender upon purchase and shares in any risk in the loan on a pari passu basis. The MSLP includes three facilities that support lending to for profit businesses: the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF). To participate in the MSLP, lenders and borrowers must provide certain certifications and covenants.

Pursuant to the Indian Gaming Regulatory Act, the NIGC Chairman must review and approve all contracts for the operation and management of a gaming operation and all collateral agreements to management contracts.[1] IGRA also requires that tribes maintain the sole proprietary interest and responsibility for the conduct of any gaming activity.[2] Your request asks for my opinion whether the MSLP requirements themselves raise any concerns under IGRA. Specifically, you have asked for my opinion whether adjustment to reflect the MSLP requirements could cause a loan facility to be a management contract requiring the NIGC Chair's approval or cause a loan facility to violate IGRA's requirement that a tribe have the sole proprietary interest in its gaming activity.

[1] 25 U.S.C. §§ 2710(d)(9), 2711.
[2] 25 U.S.C. § 2710(b)(2).

In my review, I considered the following documents describing MSLP certifications and covenants required of eligible lenders and borrowers (collectively, "the MSLP requirements"):

1. MSNLF Term Sheet (July 28, 2020);
2. MSPLF Term Sheet (July 28, 2020);
3. MSELF Term Sheet (July 28, 2020);
4. MSNLF Borrower Certifications and Covenants (June 11, 2020);
5. MSPLF Borrower Certifications and Covenants (June 11, 2020);
6. MSELF Borrower Certifications and Covenants (June 11, 2020);
7. MSNLF Lender Transaction Specific Certifications and Covenants (June 11, 2020);
8. MSELF Lender Transaction Specific Certifications and Covenants (June 11, 2020); and
9. MSPLF Lender Transaction Specific Certifications and Covenants (June 11, 2020).

MSLP guidance states that lenders should use loan documentation substantially similar to the loan documentation that the lender uses in its ordinary course of business lending to similarly situated borrowers, adjusted only as appropriate to reflect MSLP requirements.[3] Office of General Counsel opinion letters concerning the terms of loan agreements that lenders have used in the ordinary course of business lending to tribal gaming operations are available on the NIGC website. Applying the same analysis to the MSLP requirements, it is my opinion that adjusting loan documentation to reflect MSLP requirements would not affect the assessment of whether the underlying loan documentation raised any concerns under IGRA. It is my opinion that the MSLP requirements themselves would not cause a loan facility to be a management contract requiring the NIGC Chairman's approval. It is also my opinion that the MSLP requirements themselves would not cause a loan facility to violate IGRA's sole proprietary interest requirement.

<u>Management Contracts:</u>

The NIGC has defined a "management contract" to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation."[4] A "collateral agreement" is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)."[5]

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[3] Main Street Lending Program FAQ I.4. *available at* https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm.
[4] 25 C.F.R. § 502.15.
[5] 25 C.F.R. § 502.5.

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[6] A "primary management official" includes "any person who has the authority … [t]o set up working policy for the gaming operation."[7] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[8] Whether a particular employee is managerial is not controlled by an employee's actual job responsibilities, authority, and relationship to management.[9] Essentially an employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a *de jure* manager – or, in certain circumstances, where the employee acts as a *de facto* manager by directing the gaming operation through others possessing actual authority to manage the gaming operation.[10]

If a contract requires or permits the performance of any management activity with respect to all or part of the gaming operation, the contract is a management contract within the meaning of IGRA and requires the Chairman's approval.[11] Management contracts that have not been approved by the Chairman are void.[12]

<u>Management Analysis:</u>

Here, the MSLP requirements do not require the lender to include terms that would provide a third party with a management role over a tribe's gaming activities. Accordingly, it is my opinion that the MSLP requirements would not cause a loan facility to be a management contract requiring the NIGC Chairman's review and approval.

<u>Sole Proprietary Interest:</u>

IGRA requires a tribe to possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[13] "Proprietary interest" is not defined in IGRA or the NIGC's implementing regulations. Black's Law Dictionary defines a "proprietary interest" as an "interest

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[6] *See* NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[7] 25 C.F.R. § 502.19(b)(2).
[8] *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).
[9] *See Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).
[10] *Id*. at 1399 (*citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)). It is uncommon to see *de facto* management in the terms of an agreement, as it is typically an activity that arises in the day-to-day implementation of a consulting agreement. If, for example, a tribe is required to make the ultimate decision on whether the accept the advice of a consultant, but has no one on staff with the expertise or experience to make such a determination, the consultant may become the *de facto* manager in the sense that he or she is simply executing management decisions through a tribal management official.
[11] 25 U.S.C. § 2711.
[12] 25 C.F.R. § 533.7; *see also Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).
[13] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

held by a property owner together with all appurtenant rights ….”[14] An "owner" is "one who has the right to possess, use, and convey something."[15] "Appurtenant" means "belonging to; accessory or incident to ….”[16] Case law similarly defines "proprietary interest" as "one who has an interest in, control of, or present use of certain property." [17]

To determine whether an agreement violates the sole proprietary interest requirement, the NIGC analyzes three criteria: (1) the term of the relationship; (2) the amount of revenue paid to the third party; and (3) a third party's right to exercise control over all or any part of the gaming activity.[18] Accordingly, if a party other than the tribe receives a high level of compensation, for a long period of time, and possess some aspect of control, an improper proprietary interest may exist.

<u>Sole Proprietary Interest Analysis:</u>

Term of the Relationship:

Loans eligible for the MSLP must have a 5-year maturity. In general, agreements with 5-year terms do not raise sole proprietary interest requirement concerns with respect to the term of the contractual relationship.

Amount of Revenue Paid to a Third Party:

Loans eligible for the MSLP must have an adjustable rate of LIBOR (1 or 3 months) plus 300 basis points. In addition, the MSLP requirements allow for a transaction fee of 100 basis points, a loan origination fee of 100 basis points, and a loan upsizing fee of 75 basis points. In general, agreements that provide for an interest rate derived from a benchmark reference rate plus 300 basis points, transaction fees of 100 basis points, loan origination or upsizing fees of 100 basis points and 75 basis points respectively, do not violate IGRA's sole proprietary interest requirement with respect to the amount of revenue paid to a third party.

Third Party's Right to Exercise Control over Gaming Activity:

The MSLP requirements do not include requirements that the lender exercise control over a tribe's gaming activity. Accordingly, the MSLP does not provide a lender or the Federal Reserve with a right to exercise control over gaming activity that could implicate sole proprietary interest concerns.

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[14] BLACK'S LAW DICTIONARY (10th ed. 2014).
[15] *Id*.
[16] *Id*.
[17] *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).
[18] *See* NIGC NOV-11-02, (July 12, 2011); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd in pertinent part*, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision).

Upon review of these three criteria – term, compensation, and control – it is my opinion that the MSLP requirements would not cause a loan facility to violate IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

If you have any questions, please contact me at (202) 632-7003 or by email at michael_hoenig@nigc.gov.

Sincerely,

Michael Hoenig

Michael Hoenig
General Counsel