

# SBA Policy Notice



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**TO:** All SBA Employees

**CONTROL NO.:** 5000-1105

**SUBJECT:** Recovery Act – Restricted Uses of  
Funds

**EFFECTIVE:** 5-22-2009

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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the “Recovery Act”) (P.L. 111-5). Section 1604 of the Recovery Act limits the use of funds under the Act. The purpose of this Notice is to provide further guidance on this restriction on the use of funds for SBA’s Recovery Act programs. This restriction applies to 7(a) and 504 loans with reduced or eliminated fees, 7(a) loans with the Recovery Act’s increased guaranty percentage, and SBA guaranteed surety bonds for contracts over \$2 million.

## **Restricted Uses for Recovery Act Funds**

Section 1604 of the Recovery Act states that none of the funds appropriated or otherwise made available in this Act may be used by any State or local government, or any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool. Guidance issued by the White House provides that “[i]n exercising their available discretion to commit, obligate, or expend funds under the Recovery Act for grants and other forms of Federal financial assistance, executive departments and agencies, to the extent permitted by law, shall not approve or otherwise support funding for projects that are similar to those described in section 1604 of Division A of the Recovery Act.” (Memorandum for the Heads of Executive Departments and Agencies, March 20, 2009, page 2.)

SBA loan guarantees and surety bond guarantees that are funded with Recovery Act funds may not be made available to businesses primarily engaged in these activities or to businesses that intend to use guaranteed loans or bonds for the acquisition, construction, renovation or other purposes that include restricted uses.

For loans to small businesses that are ineligible under the Recovery Act or that include Recovery Act restricted uses, lenders may continue to submit applications in accordance with the procedures and requirements for 7(a) and 504 loans as stated in SOP 50 10 5(A), with a maximum guarantee percentage of 75/85%, depending on the loan amount, and pay all applicable fees. For surety bonds on contracts that include Recovery Act restricted uses, sureties may continue to submit applications in accordance with the standard procedures and requirements for SBA surety bond guarantees but the contract amount must not exceed \$2 million.

## **Restricted Businesses and Purposes**

Businesses deriving more than one-third of their gross annual revenue from legal gambling activities are currently not eligible for SBA-guaranteed business loans. (*See* 13 CFR 120.110(g))

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**EXPIRES:** 5-1-2010

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SBA Form 1353.2 (12-93) MS Word Edition; previous editions obsolete  
Must be accompanied by SBA Form 58

and SOP 50 10 5(A), Subpart B, Chapter 2 and Subpart C, Chapter 2.) This notice provides additional restrictions for Casinos, gambling establishments and Casino Hotels, which are not eligible for assistance under the Recovery Act. Aquariums, zoos, golf courses and swimming pools are eligible for SBA financial assistance under the Small Business Act and Small Business Investment Act; however, they are not eligible for assistance under the Recovery Act.

SBA will restrict certain businesses and activities from Recovery Act loan guarantees and surety bond guarantees by North American Industry Classification System (NAICS) code. NAICS is an industry classification system that groups businesses into industries based on the activities in which they are primarily engaged. Businesses that are covered by a six-digit NAICS code share the same primary activity for a particular industry. SBA currently determines whether businesses are considered small by using standards defined for NAICS groups.

NAICS codes which include the restricted businesses and activities are the following:

Casinos:	713210 (“Casinos (Except Casino Hotels)”)
Casino Hotels:	721120 (“Casino Hotels”)
Other Gambling Institutions:	713290 (“Other Gambling Industries”)
Golf courses:	713910 (“Golf Courses and Country Clubs”)
Aquariums and Zoos:	712130 (“Zoos and Botanical Gardens”)
Swimming Pools:	713940 (“Fitness and Recreational Sports Centers”)*

\*SBA will identify and review applications within NAICS code 713940 covering Fitness and Recreational Sports Centers, as this category includes both swimming pools, which are not eligible for assistance under the Recovery Act, and other types of fitness and recreational centers which may be eligible for Recovery Act assistance.

Based on the restrictions set forth in section 1604 and the White House guidance prohibiting funding of projects similar to those set forth in section 1604, loans to any small business applicant with these NAICS codes (with the exception noted above for NAICS code 713940) may not be made under the Recovery Act. In addition, loans to acquire small businesses in these NAICS codes (with the exception noted above for NAICS code 713940) may not be made under the Recovery Act. Finally, loans to an otherwise eligible small business but where the loan proceeds will be used for any of the restricted purposes may not be made under the Recovery Act.

Also, surety bond guarantees for contracts or subcontracts greater than \$2 million may not be issued to a small business applicant with the above listed NAICS codes (with the exception noted above for NAICS code 713940). Further, a contract or subcontract greater than \$2 million is not eligible for an SBA bond guarantee if the statement of work involves the construction, operation or renovation of a casino or other gambling establishment, aquarium, zoo, golf course or swimming pool.

### **Examples of Restricted and Allowable Uses**

Below is a list of examples, which is not all inclusive:

1. A loan may not be made under the Recovery Act to a small business applicant with NAICS code 721120, 713210, 713290, 713910, or 712130 for any purpose.
2. A loan may not be made under the Recovery Act to a small business applicant with NAICS code 713940 if the entity is a swimming pool or wave pool.
3. A loan may not be made under the Recovery Act to a small business applicant with, for example, NAICS code 721110 (a hotel) or NAICS code 713940 (a fitness or recreational sports center) for constructing, renovating or acquiring a casino or other gambling establishment, swimming pool, aquarium, zoo or golf course.
4. A loan may be made under the Recovery Act to a small business applicant to acquire, construct or renovate a hotel that also has a swimming pool and/or golf course if the applicant certifies that alternate funding (which may come from the borrower's equity) has been obtained to pay the costs allocable to the acquisition, construction or renovation of the swimming pool and/or golf course.
5. A loan may be made under the Recovery Act to a small business applicant that is a hotel that has a swimming pool and/or golf course if the purpose of the loan will be for working capital and the applicant certifies that no funds from the working capital loan will be used for the swimming pool and/or golf course.
6. A surety bond guarantee may not be issued on a contract or subcontract greater than \$2 million if the statement of work involves the construction, operation or renovation of a casino or other gambling establishment, aquarium, zoo, golf course or swimming pool.
7. A surety bond guarantee may be issued on a subcontract greater than \$2 million under a prime contract for the construction, operation or renovation of a hotel, if the subcontract does not involve the construction, operation or renovation of a pool and/or golf course.

### **Eligibility Certifications**

The applicant's certification that no funds from the working capital loan will be used for restricted purposes may be based on a reasonable estimate, made in good faith, of the value or cost allocable to the restricted use. Prior to first disbursement, the Lender must require the Borrower and any Operating Company to certify that alternate funding has been obtained to pay the costs allocated to the restricted use or that working capital loan proceeds will not be used for any prohibited use, as applicable. The 7(a) Loan Authorization Boilerplate will incorporate these certifications for Standard 7(a), Certified Lender Program, Preferred Lender Program and Small/Rural Lender Advantage loans. For any SBA Express or Pilot Loan Program loans, the lender will be responsible for adding this requirement to the lender's authorization. In addition, the 504 Loan Authorization Boilerplate will incorporate these certifications for 504 and Premier Certified Lender Program loans.

For Recovery Act loan guarantees, it will be the responsibility of the lender or Certified Development Company (CDC) to document in the credit memorandum that the use of proceeds does not include financing the restricted use and document the other resources that cover the financing of this component. Examples of reasonable documentation include, but are not limited to the following:

1. Thorough review of the applicant's written business application to identify any ineligible aspects to the loan request. If there are ineligible aspects, such as constructing a pool as part of the construction of a new hotel, then the lender must require the borrower to identify the source of funds that will be used to construct the pool. The lender's analysis of how any ineligible aspects of the project will be handled should be documented and put into the borrower's file. In addition, prior to first disbursement, the lender must require the Borrower and any Operating Company to certify that alternate funding has been obtained to pay the costs allocated to the swimming pool.
2. If the loan request is to construct a new fitness center, review the plans and specs to identify whether a swimming pool will be constructed as part of the center. If there will be a swimming pool, then the lender must verify that the borrower has access to separate funds to construct the swimming pool and, prior to first disbursement, lender must require the Borrower and any Operating Company to certify that alternate funding has been obtained to pay the costs allocated to the swimming pool. If there will not be a swimming pool constructed as part of the center, the lender must certify that no loan proceeds will be used for any restricted use on the applicable eligibility checklist.

For 7(a) loans, the eligibility questionnaire and checklists for the Standard 7(a), Small/Rural Lender Advantage, Preferred Lender Program, SBA Express and Pilot Loan Programs have been modified to include an additional statement that, for loans made under the Recovery Act, no proceeds will be used for a restricted use. For 504 loans, the 504 and PCLP eligibility checklists have been modified to include a similar statement. The existing Lender and CDC certification on the applicable eligibility checklist will apply to reviews for Recovery Act eligibility, as well as all other 7(a) and 504 eligibility requirements.

For Surety Bond guarantees, the Surety Bond Guarantee Application Form 990 will be amended to include an additional statement that clarifies prohibited uses for bonds for contracts greater than \$2 million that are guaranteed under the Recovery Act. For Surety Bond guarantees, surety companies will be required to certify compliance with all Recovery Act provisions. Prior Approval Sureties will certify on the Surety Bond Guarantee Agreement, Form 990. Preferred Sureties will certify on the monthly Fee Bordereau Submission.

### **Further Information**

SBA field offices will advise lenders and CDCs of this Notice. The SBA Office of Surety Bond Guaranties will advise sureties of this Notice. Questions regarding this Notice should be directed to the lender relations specialist in the local SBA field office or to the Office of Surety Bond Guarantees, as appropriate.

Karen G. Mills  
Administrator