



May 15, 2020

(Submitted electronically via the Federal eRulemaking Portal, www.regulations.gov)

U.S. Small Business Administration
409 3rd Street, S.W.
Washington, D.C. 20416

RE: Small Business Administration – Business Loan Program Temporary Changes;
Paycheck Protection Program
Docket No. SBA-2020-0015

To Whom It May Concern:

The National Multifamily Housing Council (“NMHC”) and National Apartment Association (“NAA”) provide these comments regarding the Small Business Administration (“SBA”), Docket No. SBA-2020-0015, Small Business Administration – Business Loan Program Temporary Changes; Paycheck Protection Program. This Interim Final Rule was initially made available online on April 2, 2020, and published in the Federal Register on Wednesday, April 15, 2020, at Volume 85, Number 73, page 20,811 *et. seq.* (“Rule”).

For more than 25 years, the National Multifamily Housing Council (“NMHC”) and the National Apartment Association (“NAA”) have partnered to provide a single voice for America's apartment industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of 1500 firms that own, develop, manage and finance apartments. As a federation of 153 state and local affiliates, NAA encompasses over 82,000 members representing more than 10 million apartment homes globally. One-third of all Americans rent their housing and 40 million of them live in an apartment home.

We write today to express our strong concern with the SBA’s Rule implementing the PPP. Unfortunately, and despite clear Congressional intent, the Rule casts doubt on whether owners and operators of multifamily businesses are eligible to receive Paycheck Protection Program (“PPP”) loans. SBA must clarify its guidance and bring it in line with the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* with respect to the eligibility of multifamily businesses to participate in the Paycheck Protection Program.

Congress, clearly and unmistakably, expanded eligibility for the Paycheck Protection Program beyond the limitations that SBA has historically placed on other SBA programs. Section 1102(a)(D)(i) of the CARES Act expands the types of small businesses that are eligible for an SBA loan, stating: “[I]n addition to small business concerns, **any business concern . . . shall be eligible** to receive a covered loan if the business concern . . . employs not more than . . . 500 employees . . .” (emphasis added). As one court recognized earlier this week, “Congress was aware that the SBA had historically declared certain classes of businesses ineligible for SBA lending”,

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and Congress unambiguously intended to create broad eligibility for the Paycheck Protection Program beyond these historic limitations.¹

Notably, some SBA guidance appears to support the CARES Act, as written, expanding the 7(a) loan program under PPP to all small businesses, including real estate based businesses, which actively employ employee staff. SBA's FAQ #3² appears to conform with this statutory command.

However, SBA clouds its own guidance by incorporating by reference into the Rule implementing the PPP guidance that pre-existed the CARES Act and that does not conform with the CARES Act. The Rule, Section 2(c), incorporates pre-existing guidance at 13 C.F.R. 120.110 and 2019 Standard Operating Procedures ("SOP") 50 10 5(K), Subpart B, Chapter 2.³ This creates confusion regarding the eligibility of certain small multifamily businesses. This pre-existing, inapplicable guidance, confuses the eligibility of certain so-called passive business, including "apartment buildings" and "residential facilities that do not provide healthcare and/or medical services." Again, in all respects, such exclusion is invalid, and this confusion must be clarified to confirm that all such businesses that otherwise comply with the CARES Act are eligible.

The presumption that real estate businesses, as a whole, are passive and therefore ineligible under PPP is not only legally incorrect but also factually incorrect. Multifamily housing is often an active business, directly employing officers and staff and providing high-quality and consistent service to residents. These businesses are run by real estate professionals and own, operate, develop, and manage mid-size and large apartment buildings and complex residential facilities.

Certainly, some real estate ownership and rental structures are passive, such as a limited liability company owned and controlled by a single individual that is a vehicle for ownership of a duplex or single-family property. This is fundamentally different from the ownership of most "apartment buildings" and "residential facilities". These properties are large, typically consisting of dozens or hundreds of rental units, often in multiple buildings. These properties require multiple jobs for day-to-day operations, such as porters, desk agents, maintenance and cleaning staff, leasing gents, and management staff.

¹ *DV Diamond Club of Flint, LLC v. United States Small Business Administration*, No. 20-cv-10899 (E.D. Mich. May 11, 2020) 2, 23-24 ("[T]he text of the [CARES Act] makes clear that every business concern meeting the statutory criteria is eligible for a [Paycheck Protection Program] loan during the covered period. Congress identified in the [CARES ACT] only two criteria that a business concern must satisfy in order to qualify for loan guarantee eligibility: (1) during the covered period (2) it must have less than 500 employees or less than the size standard in number of employees established by the Administration for the industry in which the business operates.")

² Frequently Asked Questions (FAQ) #3 published by SBA, which can also be found on the Treasury Department's website, provides that businesses other than a small business under Section 3 of the Small Business Act, are eligible if they meet applicable size requirements, i.e., a business "with 500 or fewer employees" can apply.

³ Small Bus. Admin., "Lender and Development Company Loan Programs," SOP 50-10-5 (*available online at* <https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf>)

The PPP is different from other SBA loan products because it is primarily designed to incentivize and support pay to employees to mitigate the impacts of the COVID-19 crisis on workers and families. Borrowers are required to self-certify their need for this relief, a need easily demonstrated as employers are forced to make the difficult choice of missing mandatory financial obligations or laying off valuable members of their workforces as renters become increasingly hard-pressed to meet their rental payment expectations.

To be forgivable, a PPP loan must be used to pay routine expenses related to payroll, mortgage interest on existing loans, rent, and utilities during the eight-week period following the loan's origination. SBA has determined that at least 75 percent of the loan forgiveness amount must be attributable to payroll costs. Clearly, a real estate-based business, that meets these requirements, is not "passive" and meets important tests to be eligible for PPP.

We request that the SBA issue a correction or clarification of the Rule immediately.

Thank you for your attention to these matters. Please feel free to contact us with any questions or if we can be helpful in addressing these matters further in any way.

Sincerely,



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