

April 16, 2020

VIA ELECTRONIC SUBMISSION - <http://www.regulations.gov>

The Honorable Steven T. Mnuchin  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

The Honorable Jovita Carranza  
Administrator  
Small Business Administration  
409 3<sup>rd</sup> Street, S.W.  
Washington, D.C. 20416

**Re: SBA-2020-0015; Interim Final Rule Paycheck Protection Program**

Dear Secretary Mnuchin and Administrator Carranza:

The undersigned real estate associations thank the Treasury Department and the Small Business Administration (SBA) for working to ensure American households and businesses have the resources necessary to respond to the COVID-19 crisis. We sincerely appreciate your efforts.

Our real estate associations represent the income-producing real estate that is a central part of the nation's economy. Total commercial real estate rents collected in 2019 are estimated to be in excess of **\$1.8 trillion**. These rents are collected from properties across a range of sectors including office, industrial, retail, multifamily, hotels, health care, self-storage and newer sectors that include data centers and cell phone towers. Rental revenues are equivalent to 9% of GDP, but are rarely recognized because they are an input rather than a final good. Rent supports the payment of expenses such as salaries, property taxes, utilities, insurance and maintenance, principal and interest expense to banks and bondholders, and only then dividends and distributions to investors.

We ask that the SBA issue guidance to remove uncertainty and confirm that developers and landlords qualify for the Paycheck Protection Program (PPP), where they meet "small business" size standards set forth in the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*.

Congress stated "**any** business concern" that employs 500 workers or less, or that alternatively meets "small business" sizing standards under SBA's "regular" loan programs, qualifies for PPP loans.<sup>1</sup> Indeed, the very heading of this provision in the law is titled, "**Increased Eligibility** for Certain Small Businesses and Organizations." Thus, the statute's plain text reflects Congress's intent that the PPP expands upon the existing 7(a) loan platform. Guidance from Treasury released on April 6 affirms such broad PPP coverage in the *CARES Act*.<sup>2</sup> The Treasury Guidance also states: "Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation of the *CARES Act* and of the Paycheck Protection Program Interim Final Rule . . . ."<sup>3</sup>

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<sup>1</sup> 15 U.S.C. 636(a)(36)(D)(i)(I) and (II), as amended by section 1102 of the *CARES Act*.

<sup>2</sup> U.S. Treasury, FAQs ## 2, 3, "Payroll Protection Act Frequently Asked Questions," dated April 13, 2020, available at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.

<sup>3</sup> *Id.* at p. 1.

However, the SBA's Interim Final Rule ("IFR") that took effect on April 2, 2020,<sup>4</sup> sends mixed signals. While nothing in the IFR directly addresses the eligibility of real estate (or any other legitimate industry) to participate in the PPP, SBA would bring in through-the-back-door another regulation and an operating manual for its **narrower** existing programs – and purports to try and apply them to the PPP with **broader** eligibility criteria.<sup>5</sup>

Our concern is with the IFR's language at pp. 7-8: "Businesses that are **not eligible** for PPP loans are identified in [13 C.F.R. § 120.110 and described](#) further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2." Subsection (c) of the referenced regulation states that passive businesses owned by real estate developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds are ineligible for a loan under the 7(a) program.

Furthermore, the section 7(a) program's SOP Manual (likewise referenced in the April 2 IFR regarding the *CARES Act's* expanded PPP) sets forth a range of commercial and residential real estate businesses that SBA interprets as ineligible for its "regular" lending programs.<sup>6</sup>

To further complicate matters, both the *CARES Act* and the Treasury Q&A state "typical" small businesses that meet size thresholds for "regular" SBA loans could qualify for PPP loans (in addition to "500-employee" businesses as described in the *CARES Act*).<sup>7</sup>

In short – and despite the *CARES Act's* plain language that "*any* business concern" that is small qualifies for the PPP – real estate businesses must consult the original April 6 and subsequent iterations of the Treasury Q&A, the April 2 and 14 IFRs from SBA, at least three existing 7(a) program rules, and an SBA 7(a) operating manual – all to answer the basic question of whether they are covered by the PPP. Such a complex analysis hardly furthers our mutual objectives to minimize regulatory friction to get PPP money out the door as fast as possible, to as many qualifying businesses as possible.

The guidance related to the PPP program and current SBA guidance are creating multiple levels of confusion for developers and landlords. First, the broad language authorizing the PPP program would appear to modify the list of ineligible businesses to allow *any* business with 500 employees or fewer to qualify. Thus, the statute preempts the ineligible business rules for this class of qualified businesses. Second, if the statute is read narrowly, there is still confusion. The ineligible business rule for developers and landlords is intended to address loans that are used

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<sup>4</sup> Available at [https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf)

<sup>5</sup> On April 14, 2020, the SBA released Additional Eligibility Criteria and Requirements for Certain Pledges of Loans available at <https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf>. Unfortunately, these additional eligibility criteria do not resolve the ambiguities described herein.

<sup>6</sup> Sections III.A.3(b)-(f) of Standard Operating procedure (SOP) 50-10 5(K), "Lender and Development Company Loan Programs" (effective April 1, 2019), available at: <https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf>

<sup>7</sup> Section 36(D) [p. 14, lines 8-9] ("... **in addition to** small business concerns, **any** business concern ...). See also *supra*, note 2.

to acquire or improve assets, and would appear to be inapplicable to a loan under the PPP, which is intended to assist business owners in meeting payroll for employees and maintaining operations.

We urge the SBA to issue guidance as quickly as possible to confirm that all developers and landlords qualify for the PPP. We believe that this reflects Congressional intent to help as many small businesses as possible through the PPP. These businesses are currently desperate for help and must have ready access to PPP loans to pay employees and their benefits, and help cover rent, utility bills, mortgage interest, and other essential operating expenses.

We thank you for considering our views and again appreciate all you are doing to assist American families and businesses to respond to the COVID-19 crisis. Please do not hesitate to contact Cindi Chetti, Senior Vice President, Government Affairs, National Multifamily Housing Council ([cchetti@nmhc.org](mailto:cchetti@nmhc.org); (202) 974-2328); Duane Desiderio, Senior Vice President & Counsel, The Real Estate Roundtable ([ddesiderio@rer.org](mailto:ddesiderio@rer.org); (202) 639-8400); or, Victoria Rostow, Senior Vice President, Regulatory Affairs & Deputy General Counsel, Nareit ([vrostow@nareit.com](mailto:vrostow@nareit.com); (202) 739-9431) should any questions arise.

Sincerely,

American Resort Development Association (ARDA)  
Associated General Contractors of America (AGC)  
Building Owners and Managers Association (BOMA)  
CCIM Institute  
CRE Finance Council  
International Council of Shopping Centers (ICSC)  
Institute for Portfolio Alternatives (IPA)  
Institute for Real Estate Management (IREM)  
Mortgage Bankers Association (MBA)  
NAIOP, the Commercial Real Estate Development Association  
National Apartment Association (NAA)  
National Association of Home Builders (NAHB)  
National Association of Realtors (NAR)  
Nareit  
National Multifamily Housing Council (NMHC)  
The Real Estate Roundtable (RER)