Council for Affordable and Rural Housing
Serving the Affordable Housing Needs of Rural America

April 9, 2020

Via E-Mail
Steven.mnuchin@treasury.gov
The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Jovita.Carranza@sba.gov
The Honorable Jovita Carranza
Administrator
U.S. Small Business Administration
409 3rd Street, S.W.
Washington, D.C. 20416

**RE: CARES Act, Paycheck Protection Program
Correcting SBA Guidance to Allow Participation by Affordable Housing and Real Estate Businesses**

Dear Secretary Mnuchin and Administrator Carranza:

This letter is to request immediate clarifying guidance to correct errors in your recent Interim Final Rule, published on April 2, 2020 (the "Rule") relating to the Paycheck Protection Program (the "PPP"). The Rule thwarts the intent, and is contrary to the express language of, the CARES Act, as described in below.

CARH represents for-profit and non-profit companies providing affordable rural rental housing throughout America. For 40 years, CARH has served as the nation's premier association for participants in the affordable rural housing profession, including builders, owners, developers, managers, non-profits, housing authorities, syndicators, accountants, architects, attorneys, bankers, and companies that supply goods and services to the industry. CARH is the only association that solely represents the needs of the entire rural rental affordable housing industry.

Many real estate companies are critical small businesses, and therefore should qualify for PPP loans on the same basis as other small businesses. Unfortunately, the Rule applies pre-existing regulations and guidance which are overly broad and would effectively abrogates the CARES Act for certain real estate companies. Owners, developers, managers and lessors of residential buildings and dwellings should qualify as "small businesses" under the Paycheck Protection Program and related programs on the same basis as other similar businesses, meaning if the business has less than 500 employees or annual receipts not above $30 million.

Across the country, numerous small businesses play a critical role in providing affordable housing for American families. These businesses provide not just shelter to low income families, but also employment, goods and services in rural communities. Many rural real estate businesses are small businesses, spending each workday managing, maintaining, renovating, operating and developing new affordable housing and providing all types of related services, everything from plumbers, carpenters, and other contractors to vendors of household supplies. The development, rehabilitation and preservation of affordable housing is also a major source of capital equity and debt investment in rural communities, financial investments which frequently involve participation in or leverage of federal, state and local programs designed specifically to address critical housing shortages and serve the public good.

These real estate businesses are also on the front lines of the coronavirus pandemic. Employees of these real estate businesses are busy providing the homes that so many Americans are staying in for shelter during these uncertain times and providing the everyday services relating to those homes that keep them functioning and accessible.

The SBA must correct and clarify the Rule to allow small real estate businesses to access PPP loans. The CARES Act, Section 1102, specifically expands the kinds of small businesses that are eligible and also generally expands allowable business types. As noted on the Treasury's website in FAQs relating to PPP loans prior to issuance of the Rule, "**All businesses** . . . **with 500 or fewer employees can apply**."

The Rule, however, incorporates the provisions regarding ineligible businesses from the 2019 Standard Operating Procedures (the "Standard Operating Procedures") and 13 CFR 120.110. The Standard Operating Procedures and 13 CFR 120.110 identify a number of ineligible types of passive businesses, including businesses "primarily engaged in owning or purchasing real estate and leasing it for any purpose," including "apartment buildings" and "[r]esidential facilities that do not provide healthcare and/or medical services." These provisions either make real estate businesses ineligible or, at a minimum, create confusion as to what small real estate businesses may participate in PPP lending.

Rural affordable housing real estate businesses have a variety of specific ownership structures. One could categorize these businesses as largely falling into four types: (1) the management company, which usually employs the greatest number of employees and is responsible for daily management of buildings and provision and coordination of services; (2) the development company, which is usually a very small business, possibly a sole proprietorship, and which relies heavily on independent contractors; (3) a special purpose entity, which typically own a particular apartment building or other real estate asset, and which secures the financing for that property and is responsible for debt repayment; and (4) general contractors and their subcontractors used in the construction and rehabilitation of buildings.

Each of these types of businesses should qualify under the CARES Act if they are small (less than 500 employees or less than $30 million in average receipts). At a minimum, the ineligibility of one category of company structure among those described above, such as a special purpose entity, should not render any other category ineligible, whether through the operation of affiliation rules or otherwise. However, because of the variety of specific structures used within each business category, by rendering some structures eligible and others ineligible, the SBA may create a result in which functionally identical businesses come to different eligibility results based on legal structure.

The Rule is broadly contrary to the CARES Act text regarding uses of PPP loan funds. The Standard Operating Procedures state that certain real businesses (as discussed above) cannot obtain SBA loans "for any purpose", which is directly contrary to the permitted uses of PPP loan funds set forth in the CARES Act, specifically: payroll costs; costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation or other debt; rent; utilities, (including rent under a lease agreement).

The Standard Operating Procedure's exceptions are insufficient, and would abrogate the permitted uses of PPP loan funds by the CARES Act. The Standard Operating Procedures do provide an exception for certain kinds of real estate leasing companies, but with limits on the use of an SBA loan to things like acquisition and rehabilitation of real property. Section 120.110(c) states that "Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds" are not eligible unless they are an "Eligible Passive Company" (EPC) under Section 120.111. (emphasis added). An EPC is "a small entity or trust which does not engage in regular and continuous business activity, which leases real or personal property to an Operating Company for use in the Operating Company's business, and which complies with the conditions set forth in § 120.111." 13 C.F.R. 120.10. An EPC may only use loan proceeds to acquire, lease or improve property it leases to an Operating Company, but if an Operating Company is a co-borrower, then the Operating Company can use the proceeds as working capital. An Operating Company must be a guarantor or co-borrower with an EPC.

In contrast, the CARES Act provides for allowed uses of PPP loan funds, including and most specifically payroll costs.

We also support other administrative and legislative approaches to ensure that all of America's small multifamily affordable housing businesses can appropriately protect their employees through the PPP program. We would be happy to work with you and your staff on any such proposals.

We greatly appreciate your attention to these comments. Small real estate businesses across rural America need these matters corrected and clarified as soon as possible. Should you require any additional information, please contact me, Colleen Fisher, at (703) 837-9001.

Sincerely,

Colleen M. Fisher

Colleen M. Fisher
Executive Director

cc: William Manger, Chief of Staff and Associate Administrator for the Office of Capital Access (William.Manger@sba.gov)
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