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April 2020

SBA Rules Carve Out Passive Real Estate Activities From PPP Eligibility

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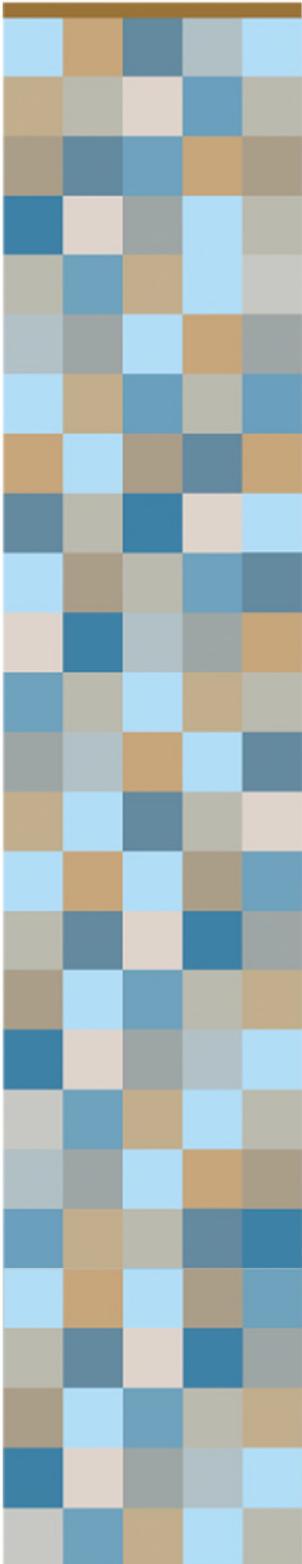
*The Interim Final Rule issued late last week by the SBA limits the availability of PPP loans to businesses engaged in certain activities. Among them are **passive landlords and developers**.*

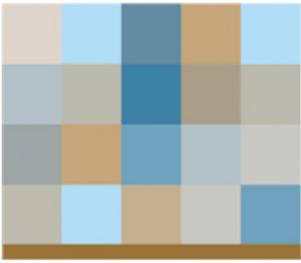
Real Estate as an Eligible Business

Paycheck Protection Program loans are only available to eligible businesses. The Interim Final Rule adopts the definition of ineligible industries generally applicable to all other 7(a) programs, which includes, among others, passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (there is a narrow exception for certain passive companies that lease to eligible small businesses). These rules, which were not included in the enabling act, appear to exclude from eligibility real estate businesses primarily engaged in owning or purchasing real estate and leasing real estate.

The SBA's guidelines exclude the following:

- Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds generally are not eligible.
- Businesses primarily engaged in subdividing real property into lots and developing it for resale on their own account.
- Businesses primarily engaged in owning or purchasing real estate and leasing it for any purpose are not eligible (e.g. shopping malls, salon suites, and like business models that generate income by renting space to accommodate independent businesses).
- Businesses that lease land for the installation of cell towers, solar panels or billboards.
- Businesses that have entered into a management agreement with a third party that gives the management company sole discretion to manage the operations of the business, including control over the employees, the finances and the bank accounts of the business, with no involvement by the owner(s) of the applicant business.





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- Apartment buildings and mobile home parks.
- Residential facilities that do not provide healthcare and/or medical services.

MHH Comment: While it is not stated in available guidance, service-related businesses (such as the operation of the cell towers, as opposed to the passive ownership) management services, and construction companies should not be excluded from the Program.

Guaranteed Payments and other Partner Compensation

Many real estate businesses are organized as limited liability companies taxed as partnerships. An open issue remains whether partner compensation including guaranteed payments qualify as payroll for the purposes of the PPP. Neither the new rules nor the final new application speak to this issue.

MHH Comment: The PPP's definition of self-employed individual arguably implies the applicability of IRC and regulations addressing pertaining to self-employment income and tax. Those regulations treat the recipient of a guaranteed payment for services as being self-employed in a trade or business. As such, it can be argued that partners receiving guaranteed payment are eligible self-employed individuals for the purposes of the program.

We are available to advise you on these and other issues related to the operation of your business during and after the Covid-19 crisis. For more information contact Robert M. Finkel at rfinkel@moritthock.com or at 212-239-5526.



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