



The Real Estate Roundtable

December 15, 2025

1071 Reconsideration NPRM  
c/o Legal Division Docket Manager  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552.  
*via regulations.gov*

Re: Docket No. CFPB–2025– 0040 or RIN 3170–AB40

The undersigned associations respectfully submit the comments below in response to the notice of proposed rulemaking (NPRM) issued by the Consumer Financial Protection Bureau (Bureau) captioned Reconsideration of Small Business Lending Under the Equal Credit Opportunity Act (Regulation B).

Our organizations represent a broad range of businesses that make or enter into loans secured by income-producing commercial and multifamily properties (“investment properties”). This includes banks and other depository institutions of all sizes, life insurance companies, sponsors of commercial mortgage-backed securities, and investment funds, among other lenders, as well as business entities that are owners of commercial multifamily properties, all of which may be affected directly or indirectly by the proposed rule.

We strongly support a number of recommendations in the reconsideration proposal. Specifically:

- Increasing the transactional threshold,
- Updating the definition of a small business, and
- Revising the new implementation period.

We support the finding that “The CFPB does not believe that alignment with the statutory purposes of section 1071 requires the use of its discretionary authority to collect data with such a breadth of scope.” We share below additional recommendations to further focus the Bureau’s information collection under 1071.

## I. INVESTMENT PROPERTIES

The rule should apply an investment properties exclusion across all non-owner-occupied, income-producing investment property types, including multifamily, non-residential, and 1-4 unit residential dwelling investment properties. Today, only multifamily properties that are required to report under the Home Mortgage Disclosure Act (HMDA) are exempt from the rule.

It is well recognized that investment property lending is a category of lending distinct from small business lending. As you will see below, the federal prudential regulatory agencies provide separate supervisory guidance for small business lending and investment property lending, and Small Business Administration (SBA) regulations exclude real estate firms that hold real property for investment purposes from eligibility for SBA small business loan programs. As a result, investment property lending should not be considered small business lending within the scope of § 1071, even where an investor may be “small.”

### SBA Regulations

SBA regulations distinguish loans to finance investments in real estate from true small business lending. For example, SBA regulations prohibit any business that receives an SBA small business loan from using any of the loan proceeds to invest in real estate that they will not actively use in their operating business.<sup>1</sup>

#### **§ 120.130 Restrictions on uses of proceeds.**

SBA will not authorize nor may a Borrower use loan proceeds for the following purposes (including the replacement of funds used for any such purpose): ... (d) Investments in real or personal property acquired and held primarily for sale, lease, or investment (except for a loan to an Eligible Passive Company or to a small contractor under § 120.310); ...

Under this rule, an SBA small business loan cannot be used to fund a real estate investment. Similarly, other SBA regulations effectively carve out real estate investment loans from small business lending by directly and indirectly disqualifying from its section 7(a) small business lending program any business engaged in developing or leasing real estate, again distinguishing SBA small business loans from loans used to fund a real estate investment.

Consider the following SBA regulation, which makes developers and landlords categorically ineligible for the SBA’s section 7(a) small business lending program:

**§ 120.110 What businesses are ineligible for SBA business loans?** The following types of businesses are ineligible: ... (c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111); ....

Another SBA regulation with a similar impact on real estate investors limits program eligibility to operating businesses.

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<sup>1</sup> See 13 C.F.R. § 120.130 (“Restrictions on uses of proceeds. SBA will not authorize nor may a Borrower use loan proceeds for the following purposes (including the replacement of funds used for any such purpose): ... (d) Investments in real or personal property acquired and held primarily for sale, lease, or investment (except for a loan to an Eligible Passive Company or to a small contractor under § 120.310); ...”).

**§ 120.100 What are the basic eligibility requirements for all applicants for SBA business loans?** To be eligible for an SBA business loan, a small business applicant must: ... (a) Be an operating business (except for loans to Eligible Passive Companies); ....

As these examples demonstrate, an approach that treats real estate investment loans differently from true small business lending is consistent with the regulatory and programmatic framework governing SBA lending.

### **Supervisory Guidance**

Supervisory guidance issued by federal prudential regulators also reflects a framework that treats real estate investment loans differently than true small business loans. For these regulators, the distinction between investment property financing and small business lending is warranted given different expectations as to the primary source of funds to repay the loan for each of these categories of lending.

Category of lending	Primary source of funds for repayment
<b>Small business lending</b>	Cash flow from the small business
<b>Investment property lending</b>	Net operating income (NIO) generated by the property itself

An Interagency Statement on Meeting the Credit Needs of Creditworthy Small Business Borrowers, for example, describes how the cash from a small business is the primary source of funds for repayment for small business lending:

For most small business loans, the primary source of repayment is often the cash flow of the business, either through the conversion of current assets or ongoing business operations. An institution’s cash flow analysis should cover current and expected cash flows, and reflect expectations for the borrower’s performance over a reasonable range of future conditions, rather than overly optimistic or pessimistic cases.<sup>2</sup>

In its Commercial Real Estate Lending Handbook, the OCC highlights to the institutions it regulates that this is true even where the loan is secured by property the business occupies and uses in the conduct of its business.

### **Loans Secured by Owner-Occupied Properties**

For owner-occupied properties, the primary source of repayment is usually the cash flow generated by the occupying business. ... As an owner-occupied loan, the underwriting analysis should emphasize the repayment ability of the occupying business.<sup>3</sup>

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<sup>2</sup> See *Interagency Statement on Meeting the Credit Needs of Creditworthy Small Business Borrowers*, p. 2 (Feb. 5, 2010) available at <https://www.occ.treas.gov/news-issuances/bulletins/2010/bulletin-2010-6a.pdf>

<sup>3</sup> OCC Commercial Real Estate Lending Comptroller’s Handbook, available at <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/commercial-real-estate-lending/pub-ch-commercial-real-estate.pdf>

*Primary source of funds for investment property lending*

The OCC Commercial Real Estate Lending Handbook highlights that the primary source of funds for repayment of loans to finance investment properties generally is the net operating income (NOI) of the property itself:

Because repayment of loans that finance income-producing real estate is typically primarily dependent on the property’s ability to service debt from cash flow and collateral value is largely determined by a property’s NOI, it is important to carefully analyze and fully understand the income generating capacity of the real estate. A property’s cash flow and NOI projections should be carefully reviewed to ensure they are reasonable and supported.<sup>4</sup>

The OCC Handbook clarifies that financial institutions should apply the same underwriting approach to credit secured by a 1-4 unit dwelling investment property, even where that credit is underwritten through the institution’s consumer-focused mortgage origination processes.

Banks are also authorized to make loans to investors for the purpose of purchasing or refinancing one- to four-family RRE [residential real estate] properties for rental to others. In many banks, investor-owned residential real estate (IORR) financing is managed like owner-occupied one- to four-family residential loans. The credit risk presented by IORR lending, however, is more similar to that associated with loans for income-producing commercial real estate. Because of this similarity, the OCC expects banks to use the same types of credit risk management practices for IORR that are used for commercial real estate lending.<sup>5</sup>

We therefore urge the Bureau to clarify that the investment property exclusion applies across all investment property types, including multifamily, non-residential commercial, and 1-4 unit dwelling investment properties.

**Specific recommendations for an investment property exclusion.**

For the above reasons, we recommend expanding the scope of the investment property exclusion, currently limited to multifamily, to cover all investment property types, using SBA regulations as a model, supplemented by supervisory guidance issued by the federal prudential regulators. We also recommend that the Bureau incorporate the investment property exclusion directly into § 1002.104(d), as well as in an official interpretation, and that the Bureau make certain technical change to the allowable values for credit purpose, consistent with a broadened scope of the investment property financing exclusion.

We provide specific suggested language below.

New subparagraph to § 1002.104(b)

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<sup>4</sup> Id. at p. 36.

<sup>5</sup> OCC, *Residential Real Estate Lending Comptroller’s Handbook* at p. 12 (Jan. 2017); available at: <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/residential-real-estate-lending/index-residential-real-estate-lending.html>

( ) Investment property credit. Credit where the loan purpose is to finance real property acquired and held primarily for sale, lease, or investment, including loans to developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds.<sup>6</sup>

#### Revised interpretation of § 104(d)-4

(4) Investment property credit. The term “covered credit transaction” does not include an application for credit where the loan purpose is to finance real property acquired and held primarily for sale, lease, or investment. This includes loans to developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds. A characteristic that distinguishes investment property credit from small business lending is that the primary source of prepayment of investment property credit is generally the net operating income (NOI) and/or sale/refinancing of the property and the primary source of repayment of a small business loan is generally the cash flow of the small business. A loan to finance a commercial property that the small business borrower will occupy or use in the furtherance of its business is not an investment property credit.

#### Conforming technical revision

As a technical conforming correction, we recommend revising the list of allowable values under the official interpretation of section 107(a)(6) to remove loan purposes that describe credit secured by investment properties (or consumer credit transactions), as follows:

##### 107(a)(6) Credit purpose.

1. General. A financial institution complies with § 1002.107(a)(6) by selecting the purpose or purposes of the covered credit transaction applied for or originated from the list below.

~~i. Purchase, construction/improvement, or refinance of owner-occupied dwelling(s).<sup>7</sup>~~

~~ii. Purchase, construction/improvement, or refinance of non-owner-occupied dwelling(s)~~

~~iii. Purchase, construction/improvement, or refinance of non-owner-occupied, non-dwelling real estate.~~

Our objective, therefore, is to ensure that the final rule recognizes that lending to finance income-producing commercial investment properties is not small business lending the rule is intended to cover.

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<sup>6</sup> By describing the exclusion in terms of loan purpose rather than by reference to the asset securing the loan, the exclusion avoids confusion in circumstances where, for example, a small business may request a loan for the purpose of obtaining working capital, where the real property that secures the loan has no relationship to the business (e.g., the primary residence of the business owner or a relative, or an income-producing property with no relationship to the business).

<sup>7</sup> Credit for the purpose of: Purchase, construction/improvement, or refinance of owner-occupied dwelling(s) would appear to be excluded as consumer credit if the loan was primarily for personal, family, or household purposes. See 12 C.F.R. § 1002.1(g), (h).

## II. SMALL BUSINESS DEFINITION

The undersigned organizations support CFPB’s recommendation to reduce the gross annual revenue threshold from \$5 million or less to \$1 million or less. However, we believe further refinement to the definition is needed.

### A. Newly formed SPEs and gross annual revenue

Something that sets commercial (including multifamily) real estate lending apart from many other types of lending is that the applicant for a commercial real estate loan is generally a single-purpose entity (SPE) rather than a business entity with broad purposes or a natural person.

An SPE, also known as a special-purpose vehicle (SPV), is established for the sole purpose of owning the commercial real property that will secure the loan. This requirement helps limit the number of creditors that might be involved in bankruptcy proceedings. The SPE can be formed in a variety of ways, including forming a Limited Liability Company (LLC) or a Limited Partnership (LP). In cases where the borrower/owner is an LP, the lender may require that the General Partner of the LP must be an SPE.

An applicant will generally be a newly formed SPE where the purpose of an application for credit is to finance the acquisition of commercial real property. That newly formed SPE will, of course, have zero gross annual revenue for its most recent fiscal year and will, in fact, have no most-recent fiscal year. As a result, the SPE applicant could appear to be a “small business” under a mechanical application of the gross annual revenue test, even if the commercial property were projected to generate \$50 million in gross annual revenue.

### Recommendation

As a practical solution to address applicants that are newly created SPEs, we recommend that the rule provide guidance that the financial institution can apply the gross revenue test to the applicant’s projected gross annual revenue. That information should be readily available to the applicant and would likely be collected by the financial institution in the normal course of underwriting the loan.”<sup>8</sup>

This guidance could be in the form of an additional subsection of official interpretation § 2001.106, specifically 106(b), as follows:

[#]. Gross annual revenue for newly formed single-purpose entities (SPEs). If the applicant is a newly formed single-purpose entity (SPE) formed for the purpose of owning real property that will secure the loan, the financial institution may rely on the applicant’s projected gross annual revenue for purposes of determining the small business status of the applicant.

### B. Definition of affiliates

The gross annual revenue test under the definition of small business measures the sum of the gross annual revenue of the applicant and the gross annual revenue of any affiliates of the applicant. If the aggregate gross annual revenue is \$5 million or less (or \$1 million, as proposed) for the most recent fiscal year, the applicant is a small business. If the aggregate gross annual revenue is greater than \$5 million (or \$1 million, as proposed), the applicant is a not a small business. As a result, affiliate

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<sup>8</sup> We note that considering projected gross annual revenue of a newly formed SPE would be in harmony with SBA’s small business lending criteria, which include consideration of “Past earnings, *projected cash flow*, and future prospects.” 13 C.F.R. § 120.150(d) (emphasis added).

revenue is an important element of the determination of whether an applicant is a small business under §2001.016(b).

As described above, in commercial real estate lending, the applicant is generally an SPE whose sole purpose is to own the property that will serve as collateral for the loan. It would be useful therefore for the Bureau to clarify how that definition of affiliates applies in the normal contexts of commercial real estate lending, both for “owner-occupied” properties and for investment properties.

#### 1. Investment properties

For loans to finance investment property (which we believe are not “small business loans,” as we discuss separately elsewhere in this comment), the SPE is generally organized by a “sponsor.” A sponsor puts together a real estate transaction to acquire or hold income-generating property, for the benefit of various investors. The investors may own shares in the LLC or other corporation, if that is how the SPE is organized, or they may be limited partners in the limited partnership if that is how the SPE is organized. The sponsor also generally maintains an ownership interest in each property.

As part of underwriting a commercial real estate loan, a lender generally will require a sponsor to provide a schedule of other real estate in which the sponsor has an ownership interest. Under the SBA general principles of affiliation, the SPEs that own that other real estate would be affiliates of the applicant SPE, because of the overlapping ownership interest. The SPEs on the schedule of real estate could additionally be affiliates of the applicant SPE where one or more officers, directors, managing members, or partners controls the board of directors or management of both the applicant SPE and the SPEs on the schedule of real estate.

As a result, the gross annual revenues of each of the affiliates can be aggregated with the gross annual revenue of the applicant SPE, to apply the gross annual income test under the definition of the “small business.” Therefore, a lender that establishes that the gross revenue of the applicant SPE and the SPEs on the schedule of real estate exceeds \$1 million can conclude that the applicant SPE is not a small business and that the loan applied for does not fall within the scope of the rule.

In some cases, however, the schedule of other real estate in which the sponsor has an ownership interest will show property valuations and not gross annual revenues. Where those properties are income-generating investment properties, one can reasonably estimate gross annual revenues. As a result, financial institutions should be able to rely on reasonable estimates of gross annual revenue of investment real property affiliates, in cases where the financial institution does not have the actual gross annual revenues for those properties, particularly where the estimated aggregate gross annual revenues is substantially greater than the \$1 million threshold under § 1002.106(b).

#### 2. Owner-occupied properties

Where a business concern seeks to finance a commercial property that business will use and occupy in its business, the applicant for the financing generally will still be an SPE. Because the SPE will be under the ownership and control of the parent operating company, the SPE and the operating company will be affiliates. As a result, the gross annual revenue of the operating company can be combined with that of the SPE when determining whether the applicant is a small business under the rule. If a lender determines that the gross annual income of the SPE applicant and the parent operating company exceed \$1 million, the lender can conclude that the applicant SPE is not a small business and that the loan does not fall within the scope of the rule.

### **Recommendation**

To provide guidance on the application of the definition of affiliates in the real estate lending context, we recommend adding an additional subsection to official interpretation 106(b), as follows:

If a real estate loan applicant presents a schedule of real estate in which they have an ownership interest then each of those assets on the schedule are to be considered affiliates of the applicant.

We appreciate this opportunity to provide input into the Bureau’s rulemaking process from the commercial real estate perspective. As we discuss above, commercial real estate lending is distinct from small business lending, and is outside of the scope of the consumer financial transactions that are more typically the subject matter of the Bureau’s rulemakings. Please let us know if there is any additional factual information on commercial real estate lending that the Bureau might find helpful as it implements section 1071. Feel free to reach out to Megan Booth at [MBooth@mba.org](mailto:MBooth@mba.org) or 202 557 2740.

Sincerely,

CRE Finance Council

Mortgage Bankers Association

National Apartment Association

National Multifamily Housing Council

Real Estate Roundtable