

IRAs in the Borrower Organizational Structure

SBL Guidance

Certain Individual Retirement Accounts (IRAs) can be governed by the Employee Retirement Income Security Act of 1974 (ERISA), including Simplified Employee Pension IRAs (SEP IRAs) and Savings Incentive Match Plan for Employees IRAs (SIMPLE IRAs). These are employer-established or funded IRAs. IRAs that individuals establish to hold retirement assets rolled over from other ERISA protected plans, including 401(k) plans, may also be governed by ERISA. In most cases, if an individual establishes and funds an IRA, it is not governed by ERISA.

However, based solely on an analysis of organizational charts and listed assets, it is impractical to determine whether an IRA is governed by or exempt from ERISA protections. Instead, if we presume that all IRAs are subject to ERISA, we can look at whether the proposed organizational structure falls under an ERISA safe harbor. These safe harbors prevent the borrower and the property from being identified as “plan assets” under ERISA and ensure that lender will not risk being identified as a limited fiduciary of the IRA. If one of these safe harbors is applicable, borrower will satisfy Section 6.18 of the Loan Agreement.

Below are guidelines that draw a simplified approval box for SBL borrowers with an IRA in the organizational structure. The information required for these determinations should be available based on organizational charts and documents and basic underwriting information (lists of other assets owned). Anything outside of these guidelines would require a case-by-case analysis that is likely not appropriate in the SBL space at this time.

Guidelines for Borrower

- Borrower cannot be an IRA.
- Borrower cannot be directly wholly owned by an IRA.

Guidelines for Ownership of Borrower

- An IRA cannot be borrower's Manager or General Partner.
- An IRA may own (directly or indirectly) less than 25% of the non-managing or limited partnership interests in borrower without any other special conditions.
- An IRA may own between 25% and 100% of the indirect interests in borrower as long as an intervening entity in the ownership structure satisfies the following conditions:
 - It is responsible for the management and development of real estate (including, through Borrower, the Property).
 - Its primary purpose is the management and development of real estate.

Ask yourself – Is/are the individual(s) identified by underwriting as having the Multifamily real estate experience to support the loan, the Manager(s) or General Partner(s) of the intervening entity? If yes, then the intervening entity is likely responsible for the management and development of the property (through the entity's control of the Borrower).

Ask yourself – Are more than 50% of the intervening entity's assets invested (directly or indirectly) in the management and development of real estate? If yes, then the 'primary purpose' condition is satisfied.

If these two conditions are met, the intervening entity is most likely a Real Estate Operating Company (REOC) under ERISA and can take advantage of one of the safe harbors.

Note: The REOC entity does not have to be the property manager, nor does it have to have employees. It is enough for the REOC entity to be active in big-picture decisions about how the borrower operates the property, including setting the annual budget for borrower's operation of the property.

Example

