

CHAPTER 2 - LOAN CLOSING

This chapter provides the Lender with guidance on closing and disbursing 7(a) loans in compliance with SBA requirements. It explains SBA's requirements by reviewing the 7(a) Loan Authorization Boilerplate and pointing out what Lenders should be looking for at the time of closing to avoid problems later.

The general requirements a Lender must meet for SBA to guaranty 7(a) loans are described, in part, in the SBA Form 750, Guaranty Agreement. The Authorization provides specific requirements for each 7(a) loan. Lenders are expected to close 7(a) loans in the same manner in which they close non-SBA loans. Lenders are responsible for knowing how to properly close loans, secure collateral, obtain and perfect the required lien positions, and meet other authorization requirements.

SBA relies on representations in the loan application and supporting documents in issuing the Authorization. **The SBA guaranty is contingent upon the Lender:**

1. Complying with the SBA Loan Guaranty Agreement, SBA Form 750 (SBA Form 750B for short-term loans) and any other required supplemental guaranty agreements between Lender and SBA;
2. Paying the guaranty fee in a timely manner;
3. Complying with current regulations and SOPs;
4. Having no evidence of unremedied adverse change that would prevent disbursement;
5. Satisfying all the conditions of the Authorization; and
6. Making timely disbursement.

Three of the most common deficiencies leading SBA to recommend a cancellation, denial or repair of its guaranty (at the time the lender requests that SBA honor its guaranty) happen at loan closing:

1. Unauthorized, improper, uncontrolled, or undocumented disbursement of loan proceeds.
2. Failure to obtain or adequately document a required equity injection.
3. Failure to obtain required collateral or properly perfect lien position.

Closing also is the last time the Lender has an opportunity to discover eligibility and credit problems before the Lender disburses the loan.

GUARANTY FEE PAYMENT

Lenders must send the guaranty fee payment to SBA's Denver Finance Center, not the SBA processing office. The address is in the Authorization.

Be sure the initial disbursement is substantially more than the amount needed to cover the guaranty fee. No disbursement can be made solely to recover the guaranty fee. It must be part of another disbursement for other loan purposes.

Guaranty Fee Due date

For loans with terms greater than 12 months, the guaranty fee is due to SBA within 90 days of the date of loan approval. For loans with terms of 12 months or less, Lender must pay this fee **at the time of application. SBA will not extend or waive the due date for payment of the guaranty fee. If the fee is not received within the required time period, the guaranty will be cancelled.**

Fees Associated with Loan Increases

If the loan amount increases, an additional guaranty fee is due within the original 90-day timeframe; however, if the original guaranty fee has already been paid and 90 days have passed since the approval date, the additional fee must be submitted by the Lender with the request for the increase.

Refunds of Guaranty Fees

- If there has been no disbursement – **Full refund**
(Lender must request cancellation of loan and return of guaranty fee. The refunded fee is paid to the Lender, not the Borrower.)
- If there has been any disbursement - **No refund**
- If the Lender already has paid the guaranty fee and then reduces the loan amount after making an initial disbursement - **No refund.**

Guaranty Fees for Two Loans Approved within 90 days

If two loans each with a maturity of 12 or more months are approved for the same Borrower within 90 days, the guaranty fee calculation on the second loan will be based on the **combined loan size and guaranty percentages**. The first loan will have a guaranty fee equal to the amount that would be due if ONLY that loan was being made. The guaranty fee will be adjusted on the second loan.

LOAN AUTHORIZATION

After SBA approves the loan guaranty, an Authorization will be issued for the loan using the required language in the National 7(a) Authorization Boilerplate (Boilerplate). The Authorization is not a loan agreement. It is a contract between the Lender and SBA, who each sign the Authorization, indicating specific conditions which must be met for SBA to provide a guaranty on a loan made by the Lender to a Borrower. The requirements of the Authorization are directed to the Lender not the Borrower, and the Borrower does not sign the Authorization

Lenders are responsible for complying with SBA requirements to keep the SBA guaranty in force, and the Authorization emphasizes this SBA policy.

The Boilerplate may be found at and downloaded from <http://www.sba.gov/banking/national/#Boilerplate>. The Boilerplate is SBA's national standard. No regional, state, or local loan authorization boilerplate language may be used in place of the Boilerplate, and the language in the Boilerplate MUST NOT be altered.

The Boilerplate is also an excellent reference document. References to the specific regulations, standard operating procedures (SOPs) and Notices that relate to each section are contained in gray boxes above each section. Therefore, SOP references will appear in this chapter only for items not found in the Boilerplate.

The Boilerplate has been programmed as a Word Wizard for use by SBA in creating Authorizations ("Wizard"). Lenders are encouraged to use the Wizard, but are not required to use it, and may automate the Boilerplate in other software if they choose. (Use of any other automation tools does not relieve Lenders from their responsibility to ensure that the Authorizations they create comply with the Boilerplate.)

The Boilerplate's nine separate sections:

- A. Guaranty Fee
- B. Servicing Fee
- C. Lender Requirements
- D. SBA Forms
- E. Lender Contingencies
- F. Note
- G. Use of Proceeds
- H. Collateral
- I. Additional Conditions

The Wizard's six separate sections:

1. Loan Information includes Boilerplate sections A.-E.;
2. Repayment Terms includes Boilerplate section F.;
3. Use of proceeds includes Boilerplate section G.;

4. Collateral includes Boilerplate section H.;
5. Additional Conditions I & II includes Boilerplate section I.

The Boilerplate reflects current SBA policy and is considered an appendix to SOP 50-10. It is updated as necessary to reflect policy changes in subsequent regulations, notices or SOP modifications. The Wizard also is updated as necessary to correct technical problems or upgrade the programming used. Updated Boilerplates are issued by Notice and replace all prior versions. Updates to the Boilerplate are available on SBA's banking website (www.sba.gov/banking).

When SBA releases a new version, Lenders have a **30-day grace period** to begin using the new version. The Wizard prints the version number in the footer of each Authorization; it also can be viewed by selecting the "About 7(a) Wizard" option in the Wizard menu.

PLP Lenders processing their own PLP loans must prepare an Authorization at the time of loan approval. PLP Lenders sign the Authorization on behalf of both the Lender and SBA, and then send it to the appropriate SBA Commercial Loan Servicing Center. When preparing the Authorization, a PLP Lender may develop an Authorization condition not pre-approved in the Boilerplate without SBA approval, if necessary, for that particular loan, *provided* Lender uses it *only 1 time*. Conditions to be used on multiple loans require SBA approval. PLP Lenders also have authority to make certain unilateral changes to the Authorization, which Lender should document with a modification letter or memorandum in order to create a paper trail of changes from approval date through closing date. Other lenders must seek SBA approval of changes to the Authorization.

Suggestions to improve the Boilerplate or to include new provisions may be sent to Auth-7a@sba.gov. The Authorization committee will consider suggested changes during the review and updating process.

SBA Loan Number

SBA issues this number when SBA approves and funds the loan. This number never changes and should appear on all closing documents and any correspondence Lender has with SBA related to the loan.

SBA Loan Name

The SBA Loan Name is the first available name from this list:

- DBA of Operating Company (OC)
- Name of OC
- DBA of Borrower
- Name of Borrower

In the case of multiple Borrowers or OCs, apply the same rule, using the first OC or Borrower listed in the Authorization. (Note: The Wizard automatically selects the SBA Loan Name based on the Borrower and OC information provided.)

The SBA Loan Name may change if there is a change in OC or Borrower name or DBA from the time of application to the time of closing. Notify SBA of any changes, so the Lender's and SBA's records are consistent.

Received date

SBA requires the inclusion of a "received date" to facilitate interest rate calculations on variable rate loans. For loans processed by SBA, upon receiving all necessary documents, the SBA processing office stamps every application "received" on the date it arrives at SBA. For PLP loans, the "received" date is the date the Lender's request for the loan number is "received" by SBA in an acceptable form, not the "approved date".

Borrower information

SBA allows single Borrowers, Co-Borrowers, and multiple Borrowers in the 7(a) program. All requirements of the Authorization which refer to Borrower also apply to any Co-Borrower.

Multiple Borrowers – Lender may make a single 7(a) loan to multiple Borrowers (however, multiple EPCs are not allowed), provided each business is a co-obligor and anyone owning 20% or more of any of the applicant businesses is a Guarantor.

Eligible Passive Companies and Operating Companies (EPC/OC) – SBA allows a loan structure where the Borrower is a passive owner of the assets to be financed with the loan proceeds and leases the assets to an "Operating Company" (OC). The Borrower in these cases is called an "Eligible Passive Company" (EPC).

When using the Wizard, if the loan is structured as an EPC/OC loan, check the box on the Wizard indicating that the Borrower is an EPC. (If the OC is shown as a Co-Borrower only, the Authorization will not contain the assignment of rents provision required for EPC/OC loans in the collateral section and will not reference the requirements that apply to both Borrowers and OC in the rest of the Authorization.)

Lender Responsibilities

The Authorization for each loan lists the specific conditions which must be met by the Lender for SBA to guaranty the loan. The Authorization does not outline what action the Lender must take to satisfy those conditions. SBA expects the Lender to know that it must:

- Prepare all necessary loan documents and have those documents signed by the appropriate individual(s), including spouses when necessary

- Perfect security interests (liens) in any collateral specified in the Authorization in accordance with applicable federal or state law
- Obtain evidence in the form of title insurance or reports or UCC lien searches that show the Lender obtained the specified lien position against all required collateral
- Disburse loan proceeds for only those purposes specified in the Authorization
- Retain evidence of how it complied with each condition set forth in the Authorization

Disbursement dates

The Lender may establish its own disbursement schedule as long as all loan proceeds are disbursed within 24 months after the date of the approval.

Note Terms

Maturity:

The Lender may calculate the loan maturity date from either the date of the Note or the date of initial disbursement. Remember, if there is a change in the use of proceeds between the date that the loan is approved and the date that the Lender is ready to close the loan, the maturity date may have to be re-calculated and changes made to the Authorization.

Repayment terms:

The repayment terms inserted onto the SBA Note must be EXACTLY the same as those Boilerplate conditions that appear in the Authorization. The Lender must not replace or supplement the repayment terms in the Boilerplate or Authorization with Lender-specific language. If there is a need for a specific term for a particular loan that is not in the Boilerplate, the Lender must obtain approval from SBA.

State-specific language:

Check the Authorization to ensure any necessary state-specific options have been inserted. If the Borrower moved to another state subsequent to loan approval, check to see that any necessary state-specific provisions that relate to the Borrower's new state of residence are added to the Authorization and loan documents.

Prepayment charges:

Every Authorization contains prepayment language that must be inserted into the Repayment Terms section of the Note, as follows:

For loans sold on the secondary market-

- Borrower may prepay up to 20% of balance at any time without charge
- For a prepayment of over 20%:

1. Borrower must give Lender three weeks written notice or pay 21 days of interest
2. Borrower must prepay within 30 days of notice date or provide Lender new notice.

For loans with a maturity of 15 or more years-

The Authorization must contain an additional prepayment fee, called a “subsidy recoupment fee.” This fee applies where the Borrower voluntarily prepays a loan; the prepayment amount exceeds 25% of the outstanding balance of the loan; and the prepayment is made within 3 years after first disbursement (not approval) of the loan proceeds. The fee calculation is as follows:

- During the first year after disbursement, 5% of the amount of the total prepayment; During the second year after disbursement, 3% of the amount of the total prepayment, and
- During the third year after disbursement, 1% of the amount of the total prepayment.

The Wizard automatically adds this provision for loans with maturities exceeding 15 years.

Use of Proceeds

The Boilerplate contains 25 specific “Use of Proceeds Options”. Lender can make one loan with several different use of proceeds provisions.

Lender must not include items to be paid by Borrower’s equity injection or other funds not related to the SBA loan in this section of the Authorization List only how loan funds are to be used.

Lender may not disburse loans funds solely to pay the guaranty fee. Lender may disburse, as working capital only, funds not spent for the purposes specifically stated in the Authorization if such funds do not exceed 10% of such specific purposes, or \$10,000, whichever is less. An EPC must not receive any working capital.

Restrictions on Use of Proceeds

Loan funds may not be paid to principals or associates of the Borrower including reimbursement for funds the Borrower already used.

Loan funds may not be used for floor plan financing.

Loan funds must benefit the business Borrower or Operating Company.

Loan funds may not be used to pay delinquent IRS withholding taxes, sales taxes, or other similar funds held in trust.

If the business has used operating capital to purchase hard assets, then those funds may, *with proper documentation*, be reimbursed to the business (not the owner) from SBA loan proceeds.

Equity injection

Lenders should document equity injection at the same time they document the use of proceeds –**at closing. The Lender must not disburse a loan until it has proof of any required equity injection.**

Proper evidence of a Borrower’s equity injection may include the copy of a check together with proof it was processed or a copy of an escrow settlement sheet with a bank account statement showing the injection into the business prior to disbursement. A promissory note, “gift letter,” or financial statement generally are not sufficient evidence.

Lack of proper and complete documentation of an equity injection required in the Authorization is one of the most common reasons for a reduction or denial of SBA’s guaranty at the time of purchase. If a Lender overlooks this requirement at the time of closing, the Lender usually finds it very difficult to adequately document equity injection at a later date.

Collateral

The Lender is expected to know what documents and procedures are necessary to obtain and perfect an enforceable security interest or lien in each class of collateral identified in the Authorization.

Federal law language

The following language must appear in all lien instruments including Mortgages, Deeds of Trust, and Security Agreements:

“The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations:

- a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law.
- b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan.

Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument."

State-specific requirements

The Authorization lists any state-specific language that must be inserted in the Guaranty or other loan documents if the Guarantor or Borrower resides in that state. If a Borrower or Guarantor moves to a different state before loan closing, Lender must follow any appropriate state-specific requirements and must add such requirements to the Authorization and any other documents required, before loan closing.

Additional Requirements

Prior to initial disbursement, the Lender must ensure that the Borrower has obtained appropriate insurance coverage, as described below. The Lender also must ensure that the insurance remains in effect for the life of the loan:

Flood insurance:

The Lender must require Borrower to obtain Federal flood insurance, or other appropriate hazard insurance, if FEMA (Form 81-93) indicates that any portion of the collateral, including personal property, is or will be located in a special flood hazard zone. The amount of flood insurance must be the lesser of the insurable value of the property or the maximum limit of coverage available, and the policy must contain a MORTGAGEE CLAUSE/LENDER'S LOSS PAYABLE CLAUSE (or equivalent), in favor of Lender. Borrowers who fail to maintain required flood insurance for the term of the loan are ineligible for future SBA assistance. The only exception is when flood insurance required for personal property collateral cannot be obtained or is prohibitively expensive. In such cases, the Lender must ask SBA for the waiver in writing and explain the circumstances.

Hazard insurance:

Borrower must insure real estate and personal property, including machinery, equipment, furniture, fixtures and inventory, that is loan collateral in an amount equal to its full replacement cost. Where Borrower is unable to insure the property at its replacement cost, coverage must be for the maximum insurable value. The insurance policy must provide for at least 10 days written notice to Lender prior to policy cancellation, and contain a MORTGAGEE CLAUSE/LENDER'S LOSS PAYABLE CLAUSE (or equivalent), in favor of Lender, and state that any act or neglect of the mortgagor or owner or the insured property will not invalidate the insurable interest of the Lender.

Life or disability insurance:

Life insurance and/or disability insurance is not required for all loans, but the Lender should require life or disability insurance where there is a concern over whether the business could survive in the absence of an individual or small group of individuals that provide the management for the small business concern. When life or disability insurance is deemed prudent, the Lender may accept a COLLATERAL ASSIGNMENT of an existing or new decreasing term or universal life insurance policy. LENDER SHOULD NOT BE NAMED AS A BENEFICIARY.

Workers' compensation insurance:

Borrower is required to obtain workers' compensation coverage in full compliance with state law.

Other insurance:

The Lender may require the Borrower to obtain additional insurance, including liability insurance, product liability insurance, dram shop/host liquor liability insurance, malpractice insurance, or other state-specific insurance requirements, depending on the nature of the business obtaining the loan and the risk Lender perceives.

Environmental Investigation and Certifications

SBA requires that, prior to loan closing and disbursement, the Lender conduct an adequate Environmental Investigation and take steps to mitigate the liability associated with the risk of environmental contamination on all primary collateral offered as security for any SBA-guaranteed loan. See Chapter 1 of this Guide for more details. Prior to loan closing, Lender must obtain all certifications set forth in paragraph 9 of the Boilerplate regarding environmental contamination.

Borrower, Guarantor and Operating Company Documents

Different documents are required for the different types of legal entities (for example, corporations, sole proprietorships, partnerships, limited liability companies, and limited liability partnerships). Several common types of legal structures and their required documents are listed in the Authorization. This list provides Lenders with general guidance on the documents required for the various types of entities, and accommodates changes in organization structure that may be made before closing. Lenders must notify SBA of any changes to Borrower's or Operating Company's structure or organization, and must submit material changes to the Authorization for SBA approval.

This section also contains requirements for the small business concern's trade name registration, evidence that ownership and management have not changed without Lender's approval and some additional optional paragraphs.

Operating Information

Tax return verification and SBA/IRS Form 4506T

SBA requires Lenders to verify the accuracy of financial information being relied on for the credit and eligibility determination. The only exceptions to this requirement are (i) for start-up companies (who have no financial information to verify) and (ii) for Guarantors. (Note: If the transaction involves a change of ownership, verification of the seller's financial information is required.)

The Lender must use an SBA/IRS Form 4506T to request a transcript, not a copy, of the tax return. The transcript provided by IRS is a line by line summary. (Partnership and corporate returns are not transcribed in full but are rather covered in a form letter containing limited financial data.) To expedite the loan application process, Lenders are advised to submit Form 4506T as soon as possible in the application process. Ordinarily, IRS responds within two weeks.

Upon receipt of the IRS transcript, the Lender must compare it with the financial statements that the Borrower submitted prior to any disbursement. If there is a significant discrepancy, the Lender must notify SBA and not disburse any loan proceeds until the discrepancy is resolved. If that happens, the Lender can inform the applicant that SBA halted disbursement while it investigates an adverse change but the Lender may not refer to the IRS verification specifically. SBA may deny liability on its guaranty to any Lender who disburses any proceeds whatsoever before receiving a response (or after receiving a response but before a discrepancy is resolved).

If the IRS has not responded within 10 business days from the time Lender submitted the 4506T, Lender may disburse the loan but still must obtain a response from the IRS, by resubmission of the 4506T if necessary, and must conduct the necessary comparison.

Authority to conduct business

The Lender must obtain evidence of the Borrower's Employer Identification Number (EIN) and any permits, licenses, insurance or other approvals necessary for the Borrower to lawfully operate the business. For example, if the Borrower is an attorney, engineer or doctor, the Lender is required to obtain a copy of the license required by the state.

Other Possible Requirements

Agreement of franchisor

This agreement includes access to the franchisor's books, 30 days notice to Lender of intent to terminate the franchise agreement giving the Lender an opportunity to cure, and deferral of franchise fee payments if loan goes into default. If these requirements cannot

be met, they can be waived if there are only minimal credit effects from not having these agreements.

Change of ownership

A stock purchase may be used to effectuate a change of ownership in a going concern. This method may be used where (1) the corporation redeems or repurchases all outstanding shares from existing shareholders, or (2) a third party buyer purchases all outstanding shares from existing shareholders. In either case, certain documentation is required at loan closing:

- The buyer(s) and corporation must sign the note;
- The principals of the buyer will be required to guaranty the loan; and
- The Lender should obtain an opinion from the Borrower's or Lender's counsel that the transaction complies with state law and specifying that adequate consideration exists and that the corporation cannot deny liability for the debt for failure of consideration.

Appraisals

The Authorization may require an appraisal of real estate or equipment. An appraisal is not required for real estate pledged as collateral but not financed by the SBA loan, unless the real estate is the "primary collateral" for the loan. Real estate is considered "primary collateral" for loans where the assets being financed provide less than 50% collateral coverage.

Appraisers must be:

- Independent and have no direct or indirect, financial or other interest in the property being appraised or the loan transaction.
- Capable of rendering an unbiased opinion.
- Hired and paid by the Lender, not the Borrower or the seller of the property or business. State certified or licensed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP).

A Lender may accept a SELF-CONTAINED APPRAISAL REPORT or a SUMMARY APPRAISAL REPORT however, a RESTRICTED APPRAISAL REPORT is never acceptable for an SBA-guaranteed loan. An acceptable appraisal will:

- Identify and describe the real property
- Identify the interest being appraised and include the legal description and known encumbrances
- State the purpose and intended use of the appraisal
- Define the value (cost, income or comparable sales) to be estimated
- State the dates of the appraisal and report
- Identify all assumptions and limiting conditions

- Specify how data was collected and reported
- Describe the information considered, procedures followed, analysis, opinions and conclusion
- Provide the appraiser's opinion of highest and best use, when appropriate
- Explain the exclusion of any usual valuation method
- Provide any additional information that may be appropriate
- Have the signature and certification of the appraiser and include a disclosure by the appraiser of any involvement or relationship with the owner.

Special Provisions When the Loan Covers Construction

Earthquake provision

When loan proceeds are used to construct a new building or to construct an addition to or renovate an existing building, the Authorization will include a provision entitled "Building Standards," which requires the Lender to comply with Presidential Executive Order 12699 "Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction". The Lender must comply with this requirement even if the construction project is not located in an area historically known for earthquake activity.

This means that all construction must comply with either the standards published by the National Earthquake Hazards Reduction Program's "Recommended Provisions for the Development of Seismic Regulations for New Buildings" (NEHRP) or one of these alternative standards:

- 1991 Uniform Building Code of the International Congress of Building Officials (ICBO);
- 1992 Supplement to the Building Officials and Code Administrators (BOCA) National Building Code; or
- 1992 Amendments to the Southern Building Code Congress (SBCC) Standard Building Code.

Lenders must obtain a certification from a licensed architect, construction engineer, or similar professional, or a local or state agency responsible for building code enforcement, stating that the construction complies with the NEHRP standards or one of the alternative standards.

General construction loan requirements

These provisions are intended to ensure quality construction and reduce the risk to both the Lender and the Borrower should the loan proceeds allocated to the construction turn out to be insufficient to cover the full cost of construction. Generally, Lender may not allow the Borrower to act as its own general contractor (SOP 50-10 (4)(B), Subpart A, Chapter 5, paragraph 6(e)(2), page 110).

Lender must:

- Obtain evidence of the Borrower’s ability to pay cost overruns,
- Make regular inspections to ensure that construction conforms to plans,
- Obtain evidence that the completed building will meet all necessary codes and permits requirements,
- Obtain properly executed Forms 601,
- Obtain lien waivers or releases, and
- Take all safeguards appropriate to construction loans.

When building inspections are required as a condition before disbursing additional proceeds, the inspections must be conducted by a qualified individual. Inspections by Lenders are not sufficient and do not comply with SBA’s requirements.

SBA Form 601 is required by federal civil rights laws when proceeds of more than \$10,000 are used for construction. This form, known as the “Agreement of Compliance”, is a certification that the contractor has complied with anti-discrimination laws. Both the contractor and the Borrower must execute the SBA Form 601 no later than the loan closing. SBA Form 601 is not required when SBA-guaranteed funds are used to refinance interim debt.

Bond requirement

SBA requires a 100% payment and performance bond and builder’s risk insurance for any 7(a) loans where more than \$125,000 in SBA-guaranteed proceeds are used to directly finance construction. This is to ensure that the construction will be completed if the construction contractor fails to do so.

SBA will consider waiving this requirement if the Lender meets certain strict conditions. In general, the Lender must provide proper documentation of the project and very closely monitor the disbursement of loan proceeds. This includes using construction mortgages and lien waivers to protect the Lender and SBA and place their legal claims ahead of all others. In addition, Lender must document that the Borrower made any required equity contribution to pay for the early stages of construction. PLP Lenders have the authority to grant this waiver *provided* that the Lender documents the waiver in writing and places the documentation in the loan file.

No bond is required if SBA-guaranteed loan proceeds are being used solely to refinance interim construction debt and SBA is not guaranteeing that interim debt—sometimes known as “takeout” financing. In this case, there is no need for the protection provided by a bond because the risk is being “assumed” by the interim Lender and SBA funds are not involved until after the construction is completed.

Additional requirements when construction financing exceeds \$125,000

In addition to the bond and insurance provisions discussed above, SBA imposes certain documentation requirements on the Lender if the SBA-guaranteed portion of construction

financing exceeds \$125,000. For example, the Lender is required to obtain a copy of the Borrower's construction contract which must not exceed a specified price. The Authorization will specify provisions that must be in the construction contract with regard to the Borrower requesting or agreeing to material changes in the plans. If the Borrower is putting its own funds into the construction project, the Lender must have evidence that it has done so before disbursing any SBA-guaranteed loan funds.

Requirements When the 7(a) Loan is the Take-out Financing for a Construction Loan

When the 7(a) loan is not used for construction financing, the Lender still has certain documentation obligations. Either prior to the 7(a) loan closing or at the closing, the Lender must have evidence that several conditions have been met. These conditions include: that the construction has been substantially completed: the project has been paid-in-full: and that no unpaid labor or materialmen's liens (such as a mechanic's lien) exist. Other conditions are listed in the Authorization under the heading, "Construction Financing without SBA Guaranty."

Borrower's Certifications

As part of the terms and conditions of the Authorization, the Lender must obtain certain certifications and agreements from the Borrower and the Operating Company prior to disbursement of loan proceeds. These certifications are generally found in paragraph 9 of Section I (Additional Conditions) of the Authorization.

Mandatory certifications required from Borrower and Operating Company

The following certifications are required for all Authorizations:

- Receipt of Authorization
- Child Support
- Current Taxes
- Environmental
- Reimbursable Expenses
- Book, Records, and Reports
- Equal Opportunity
- American-made Products
- Taxes
- Distributions
- Ownership Changes
- Transfer of Assets

Additional certifications from Borrower and Operating Company

The Authorization provides for additional certifications from Borrower and Operating Company, concerning fixed assets, location, and salary limitations and occupancy. Limitations on acquiring fixed assets, new locations, and withdrawals and salaries are imposed only when necessary for the protection of SBA. Occupancy certifications are required when loan proceeds are used for the purchase or renovation of an existing building or construction of a new building.

Sample Borrower's Certification

The sample form in Appendix D of the Boilerplate, Borrower's Certification (3 pages), is a compilation of the various certifications found in the Boilerplate and provides a space for the Borrower to initial next to those certifications applicable to the particular loan. Lenders must retain an executed document containing these certifications, and may use this sample form as a basis for that document or for incorporating the required certifications into their loan agreement (if Lender uses one). The certifications, not the form, are required. Lenders may create and use their own certification form.

Sample Loan Agreement

SBA does not require a separate loan agreement to be signed by the Borrower. If it is the Lender's custom to require a loan agreement, it may do so. The Lender may use its own form of loan agreement or it may use the sample SBA form found in Appendix D of the Boilerplate.

Required SBA Forms for Closings

With the exception of SBAExpress loans, Lenders must use the SBA forms listed in Section D of the Authorization. Substitutions are not allowed. Lenders may use computer-generated versions of mandatory SBA Forms, as long as they are exact reproductions. These forms are:

- Note, SBA Form 147, version 4.1
- Guaranty, SBA Form 148
- Limited Guaranty, SBA Form 148L
- Settlement Sheet, SBA Form 1050
- Compensation Agreement, SBA Form 159
- Agreement of Compliance, SBA Form 601
- Equal Employment Opportunity Poster, SBA Form 722
- Notice to New SBA Borrowers, SBA Form 793
- Tax Return Verification, SBA/IRS Form 4506T

The Wizard will automatically insert into the Authorization a list of required forms, as applicable.

The Authorization contains the information needed to complete these forms. SBA Forms and Instructions can be found at www.sba.gov/banking.

Note, SBA Form 147

Lenders must use SBA Form 147, Version 4.1, and must follow the instructions accompanying the form on how to complete the form.

In the Information Grid at the top of the Note, Lenders must insert information as follows:

- SBA Loan Number and SBA Loan Name: same as stated in the Authorization; name must match signature block
- Date: the date the Note will be signed
- Loan Amount: principal amount
- Interest Rate:
 1. Fixed rate loans – insert the actual fixed rate, for example “10%”
 2. Variable rate loans – insert “variable rate” or “P+2%”

- Borrower:
 1. Insert ALL Borrower names
 2. No DBAs

- Operating Company:
 1. Applicable only if EPC structure
 2. Insert Operating Company name
 3. No DBAs

The “SBA Loan Name” and the “Borrower” are not usually the same. Under the SBA Loan Name convention, the Borrower Name is the last option for the SBA Loan Name. If any of the names have changed from the time the loan was approved, the Lender must notify SBA as well as document the changes on the Authorization.

Remember:

- Repayment terms must match the Authorization exactly.
- Check for state-specific terms in the Repayment section and the Collateral section of the Authorization.

Guaranty, SBA Forms 148 and 148L

The Authorization will indicate whether repayment of the loan must be guaranteed by specific individuals or specific legal entities, such as corporations, trusts, or partnerships. Whenever the Authorization requires Guaranties, the Lender must use SBA Form 148,

Unconditional Guaranty, or SBA Form 148L, Limited Unconditional Guaranty, and must follow the instructions accompanying the form on how to complete the form. The use of this form ensures nationwide consistency in court decisions interpreting the enforceability of the guaranty against guarantors of SBA loans.

The Authorization will indicate whether a Guaranty must be full or limited. SBA Form 148 is used whenever the Guarantor is liable for repayment of the entire amount of the Borrower's loan. SBA Form 148L is used whenever the Lender intends to limit the scope of the Guarantor's liability, such as limiting the amount or duration of the Guaranty, or limiting the Guarantor's obligation to the Guarantor's interest in any property (real or personal) pledged to secure repayment of the loan. If a Guaranty is limited, the Authorization will describe the limitation.

The Lender should use a separate Guaranty form for each Guarantor. This will allow greater flexibility in developing a plan for liquidating a loan if that should become necessary in the future. (The Lender may need to sue Guarantors in different states or attempt to collect from one Guarantor after another Guarantor's liability has been discharged in bankruptcy.)

In the Information Grid at the top of the Guaranty, Lenders must insert information as follows:

- SBA Loan Number and SBA Loan Name: same as stated in the Authorization
- Guarantor: name of Guarantor for this Guaranty; name must match signature block
- Borrower:
 1. Insert ALL Borrower names
 2. No DBAs
- Date: the date this Guaranty will be signed
- Note Amount: principal amount, numbers only

Remember to check the Collateral section of the Authorization for any state-specific conditions that Lender may need to include on the Guaranty form. Collateral securing the Guaranty must not be listed on the Guaranty form.

Settlement Sheet, SBA Form 1050

The Lender is responsible for disbursing loan proceeds strictly in accordance with the requirements of the Authorization; failure of a Lender to do so is a leading cause for SBA to deny its liability under the SBA loan guaranty.

Except for all Express loans, the Lender must document loan disbursements on SBA Form 1050, Settlement Sheet. This form is signed by both the Lender and the Borrower at the time Lender makes the disbursement and must contain sufficient detail for SBA to determine who received loan proceeds, when the loan proceeds were disbursed and in what amount and, most importantly, how the loan proceeds were used.

The Lender must obtain evidence, such as cancelled checks or paid receipts, to ensure that the Borrower used loan proceeds for purposes stated in the Authorization. The Form 1050 also requires Lenders to disburse loan proceeds using joint payee checks when possible.

The Lender must retain the signed SBA Form 1050, Settlement Sheets, as well as all other documents that support the Borrower's use of loan proceeds. If the Lender subsequently requests that SBA purchase the guaranteed portion of the loan, it must submit complete documentation that loan proceeds were used as authorized.

Compensation Agreement, SBA Form 159

An SBA Form 159 must be completed for every representative that the Borrower engages to assist it in obtaining financial assistance. This requirement covers every person (or company) that charges the Borrower in connection with its application, especially loan packagers. If a Borrower employs the services of both an attorney and an accountant, each of them must complete a separate Form 159. Any Agent paid directly by the Lender and not by the Borrower (either directly or indirectly) does not need to complete a Form 159.

The fees paid must bear a reasonable relationship to the services actually performed and be reasonable in the market where Borrower is located. Therefore, contingency fees, where the person providing the assistance is paid only if the Borrower obtains assistance, are not permitted. The fee must relate to the services (and, therefore, the time spent). Therefore, fees that are based upon a percentage of the loan amount sought are not generally approved.

If the fee charged exceeds \$1,000, the representative must provide additional documentation. This includes all of the following: each date a service was rendered, a description of the service, the time spent on that date, and the cost accrued on that date. A bill, for example, that says simply a total of \$x is owed "For Services Rendered" is not adequate.

SBA Forms 722 and 793

These two required forms must be provided to the Borrower in connection with every loan closed. The SBA Form 722 is an "Equal Opportunity Poster" and SBA Form 793 is a "Notice to New Borrowers."

The poster notifies the Borrower's employees as well as the public that they have the right under federal law not to be discriminated against. Therefore, federal law requires

the Borrower to display this poster “where it is clearly visible to employees, applicants for employment, and the public.”

Form 793 explains to Borrowers what actions they should take to ensure that they are complying with the requirements of SBA regulations and federal law on the subject of non-discrimination. SBA regulations permit the agency to examine the Borrower’s employment, payroll, and related records at any time to confirm that they are complying with federal law. The form also contains a proposal for a “Model Policy Statement” and other suggestions to help the Borrower comply with federal law.

Optional SBA Forms

SBA has kept the number of SBA standard loan closing forms that a Lender must use to a minimum, to allow the Lender maximum flexibility to close its loans efficiently and economically. SBA does, however, offer a number of standard forms that a Lender may use in its own discretion, if the Lender, or its counsel, determines that such forms are legally sufficient under applicable state law. These forms include:

- SBA Form 155, Standby Creditor’s Agreement (Used to restrict the Borrower’s payments to other creditors)
- SBA Form 160, Resolution of Board of Directors (Used to document that a corporate Borrower has authorized the corporation to enter into the loan obligation and authorized certain corporate officers to execute the documents necessary to bind the corporation to the obligation.)
- SBA Form 160A Certificate as to Partners (Used for same purpose as SBA Form 160, but for a partnership Borrower.)

Standby Creditor’s Agreement, SBA Form 155

Frequently, Lenders will want to restrict the ability of the Borrower to pay its other creditors while the 7(a) loan remains outstanding to conserve cash flow. In these instances, the Lender may use SBA Form 155, Standby Creditor’s Agreement to exert control over the Borrower’s ability to pay its other creditors. When using SBA Form 155, the Lender must remember five key points:

- The “Standby Borrower” is the SBA Borrower and the “Standby Creditor” is the Borrower’s other creditor, not the Lender.
- The form contains a menu of choices, which allows Lender to select the appropriate restriction on the Borrower’s ability to pay its other creditor(s).
- In order to be enforceable, the Standby Creditor must sign and date the form.
- The Lender’s right to stop the Standby Creditor from accepting or retaining payments made by the Borrower is predicated in most cases by the requirement that the Lender separately notify the Standby Creditor to stop accepting payments.
- SBA Form 155 will not subordinate any security interest held by the Standby Creditor in the same collateral pledged to secure repayment of the SBA loan. This must be accomplished with a separate Subordination Agreement.