



SBA Procedural Notice

TO: All SBA Employees

CONTROL NO.: 5000-1327

SUBJECT: Corrected 504 Loan Closing
Procedures: Waivers of
Indemnification Provisions
Required at Closing

EFFECTIVE: 9/24/14

This Procedural Notice is a correction of the originally issued Notice 5000-1320 effective 9/24/14.

SBA has recently received multiple inquiries regarding open-ended indemnification clauses in real estate title documents applicable to 504 project real estate collateral. Such clauses may create a violation of the Anti-Deficiency Act (ADA) and the Adequacy of Appropriations Act (AAA) if the Agency were to take title to the property. Certified Development Company (CDC) closing counsel and SBA District Counsel currently review real estate title documents prior to closing and identify such clauses so that the CDC can work to obtain a waiver of the clause as applicable to SBA. This process ensures Agency compliance with legal requirements.

SBA's 504 industry partners (e.g., CDCs, National Association of Development Companies, Third Party Lenders (TPL), and closing attorneys) have expressed concerns that obtaining waivers of indemnification clauses is time consuming and can cause significant delays in the closing process, even to the point of halting the 504 project altogether. CDCs have also encountered disinterested parties that are not willing to provide the waivers.

SBA is continuing to review and assess this issue and to explore potential solutions. To address this situation in the interim, however, SBA has developed procedures to ensure compliance with legal requirements while reducing closing delays and potential termination of 504 projects. The procedures address loan closing efficiency and manage risk to the Agency by identifying properties with open-ended indemnification clauses prior to closing, obtaining waivers as available, and tracking those projects where waivers cannot be obtained for further consideration after debenture purchase.

Below are the procedures that, until further notice, will be required when there is an open-ended indemnification clause on the 504 project real estate title documents. If SBA develops an alternative solution or if the law is changed in the future to create an exception to the ADA and the AAA for these transactions, SBA will provide notification that these procedures will no longer be necessary.

1. CDCs and their closing attorneys will review title documents for any open-ended indemnification clause(s) and make a good faith effort to obtain a waiver on behalf of SBA prior to closing. "Good faith effort" will require the CDC to demonstrate (1) review of title documents as soon as practicable to identify indemnification covenants, (2) attempts to locate the party with authority to waive the indemnification provision, and (3) negotiations with this party for an exception to the indemnity requirements for SBA. Identification of indemnity clauses and negotiations for release of the indemnities should be done as early as practicable to minimize closing delays. If the waiver is not obtained despite the CDC's

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good faith efforts, the CDC must submit to SBA as part of the closing package, documentation of its efforts to obtain the waiver, which must be acceptable to the SBA District Counsel responsible for closing the loan. SBA District Counsel may, at his or her option, also seek to obtain a waiver.

2. SBA District Counsel/Lender Relationship Specialist will add a "Red-flag" notation in the SBA electronic chron system and will include a comment in the file for any 504 loan closed with an indemnification clause that has not been waived. The red-flag comment should be entered in both the "Loan Comment" section in the electronic chron system (so that it will be immediately visible to an SBA employee) and as a "New Chron" comment so that the entry will be permanent. Both entries should be in bold.
3. In the event a red-flagged 504 debenture is purchased, the appropriate Commercial Loan Servicing Center (CLSC) will advise all affected SBA employees of the need to protect the SBA's interest in the property in a manner that does not violate the ADA or the AAA.

Additionally, in the event of liquidation of any currently outstanding 504 loan, SBA legal counsel will review the title for indemnification clause(s) prior to any foreclosure sale to advise the CLCS and the CDC of properties that raise ADA/AAA issues so that they can be handled appropriately.

The policy on environmental indemnifications under SOP 50 10 5(G), Subpart C, Chapter 3, Paragraph III is not changed as a result of this Notice. The SOP requires that waivers must be obtained on all property subject to an environmental indemnification.

Notification and Questions

SBA field offices must notify CDCs about this Notice. Questions concerning this Notice should be directed to either the District Counsel or the Lender Relations Specialist in the local SBA field office. The local SBA field office may be found at www.sba.gov/about-offices-list/2.

Linda S. Rusche
Director
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