

**SBA Policy Notice**

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| **TO:** | All SBA Employees | | **CONTROL NO.:** | 5000-1204 |
| **SUBJECT**: | | Further Guidance on Refinancing Debt in the 504 Certified Development Company Loan Program as Authorized by the Small Business Jobs Act | **EFFECTIVE:** | 4/8/2011 |

On February 17, 2011, SBA issued Policy Notice 5000-1197 to provide guidance on the 504 Certified Development Company Loan Program Regarding Debt Refinancing Authorized by the Small Business Jobs Act, P.L. 111-240 (Temporary Debt Refinancing Program). This Policy Notice provides further guidance with respect to certain standby requirements, modification or assignments of existing loan documents, the use of an Interim Lender or escrow account, and the refinancing of same institution debt.

**Standby Requirement**

SBA provided in Policy Notice 5000-1197 that in cases in which there was a deficiency remaining on the debt to be refinanced, the Agency would determine what effect, if any, the disposition of the deficiency had on the Borrower’s creditworthiness and that SBA may place additional restrictions on the remaining debt, such as requiring that the debt be placed on standby during the term of the 504 loan. *See* ¶ (12)(a) of Policy Notice 5000-1197. In Examples 2 and 3 set forth in Policy Notice 5000-1197, SBA indicated that if the Borrower executed a new Note for the remaining debt, that Note must be subordinate and “…is subject to any other restrictions that SBA may establish, including a requirement that the loan be on standby for not less than three years.” *See* ¶ (12)(d) of Policy Notice 5000-1197. The purpose of this Policy Notice is to clarify that SBA will consider alternative recommendations by the CDC concerning the subordinate debt, and will consider, on a case-by-case basis, based on the Borrower’s cash flow and credit risk:

* whether the Note covering the deficiency should be placed on standby;
* whether the standby should be full or partial (*e.g.*, only payments of interest permitted); and
* if the Note is placed on standby, the duration of the standby.

**Modification or Assignment of Existing Loan Documents**

When the loan being refinanced is Same Institution Debt, as defined in 13 CFR § 120.882(g)(15), the Third Party Lender may modify its existing loan documents (Note, Deed of Trust/Mortgage, etc.) instead of requiring the Borrower to execute and record new loan documents for the Third Party Loan.

With respect to other institution debt (*i.e*., debt that is not Same Institution Debt), SBA may permit the Lender of the debt to be refinanced to assign its existing loan documents to the Interim Lender if an Interim Lender is used, or to the Third Party Lender if no Interim Lender is used. The existing loan documents may be modified, as appropriate rather than requiring that new documents be executed for the Refinancing Project. The Interim Lender, if any, may then assign the documents to the Third Party Lender.

All modified loan documents must meet SBA’s regulatory requirements for a Third Party Loan (*see* 13 CFR § 120.920 and 120.921).

These loan modifications or assignments will avoid the costs for title insurance and filing fees for the Interim or Third Party Loan, which are significant in some jurisdictions. Thus, this clarification may represent a significant costs savings to the Borrower.

**Use of Interim Lender or Escrow Account**

The purpose of this Policy Notice is also to clarify under what circumstances SBA requires that an Interim Lender be used for the Temporary Debt Refinancing Program and when an escrow account is permitted instead. In summary, if the debt being refinanced is Same Institution Debt (as defined in 13 CFR 120.882(g)(15)), no Interim Lender may be used but an escrow account is required. If the debt being refinanced is other institution debt, then an Interim Lender is required and no escrow account may be used.

More specifically, if the debt being refinanced is Same Institution Debt:

* The Third Party Lender (who, in this case, is also the Lender of the debt being refinanced) must execute SBA Form 2416, Lender Certification for Refinanced Loan.
* The CDC must create an escrow account at the time of closing of the 504 loan for the purpose of holding the Borrower’s cash contribution, if any, and the net debenture proceeds.  The following requirements apply to the escrow account (“the account”):
  + The account will be established in accordance with an Escrow Agreement which must be executed by the Borrower, the Third Party Lender, the Escrow Agent and the CDC. The account may be held by the CDC attorney, Title Company or other party approved by SBA District Counsel.
  + The Borrower’s cash contribution, if any, must be deposited into the account at the time of closing of the 504 loan.
  + A copy of the Escrow Agreement must be provided to the District Counsel with evidence of funding by Borrower’s cash contribution, if any, at the time of closing of the 504 loan.
  + The net debenture proceeds must be wired to the account, and all funds may be released only upon written approval by the CDC and SBA, provided that CDC/SBA have the required lien positions on the collateral as set forth in the Authorization and Debenture Guaranty.
  + The debt to be refinanced will be satisfied upon payment of the escrowed funds to the Third Party Lender.

If the debt being refinanced is other institution debt, then the Interim Lender must execute SBA Form 2288TR, Interim Lender Certification for Temporary Refinancing Program, similar to what is required in all 504 closings.  SBA Form 2416 will not be required. No escrow account will be permitted when an Interim Lender is used.

**Requirements Regarding No Shift of Loss Certification**

The purpose of this Policy Notice is also to modify ¶ (8) of Policy Notice 5000-1197 with respect to the certification that the Third Party Lender is required to make for refinancing involving Same Institution Debt. As a result of this modification, the Third Party Lender’s certification to the CDC and SBA must state that the Third Party Lender is not in a position to sustain a loss on the Refinancing Project amount causing a shift to SBA of all or part of a potential loss from the existing debt. This certification must be made as instructed in SBA Form 1244D and included in the Third Party Lender’s commitment letter (Exhibit 19 of SBA Form 1244). This change in the certification makes this certification similar to the certification that is made for refinancing in the 7(a) loan program.

Questions regarding this notice should be directed to 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](http://www.sba.gov/about-offices-list/2).

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Karen G. Mills

Administrator