

SBA

SOP 70 50 3

LEGAL RESPONSIBILITIES

**Office of the General Counsel
U.S. Small Business Administration**



SMALL BUSINESS ADMINISTRATION STANDARD OPERATING PROCEDURE

National

SUBJECT: Legal Responsibilities	S.O.P.		REV
	SECTION 70	NO. 50	3

INTRODUCTION

1. Purpose. This SOP describes the role of field counsel within the context of the General Counsel's overall responsibility to ensure quality and excellence in the provision of legal assistance and advice to Agency management and personnel.
2. Personnel Concerned. All SBA involved in the provision of legal assistance and advice to Agency personnel.
3. Directives Canceled. SOP 70 50 2.
4. Originator. Office of General Counsel.

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CHAPTER 1

GENERAL INFORMATION

1. What is the Purpose of this SOP?

- a. The Office of General Counsel (OGC) develops and implements plans, procedures, and standards for providing legal services in support of Agency program operations. This SOP describes the role of field counsel within the context of the General Counsel's overall responsibility to ensure quality and excellence in the provision of legal assistance and advice to Agency management and personnel.
- b. In fulfilling your duties and responsibilities as field counsel you must:
 - (1) Ensure legal and policy compliance in the administration of Agency assistance programs;
 - (2) Serve as the General Counsel's field representative with respect to issues affecting the Agency and provide timely reports to the Office of General Counsel;
 - (3) Maintain a positive and meaningful "customer service" attitude with the small business community and SBA's partners and personnel; and
 - (4) Stress professionalism and integrity in the delivery of Agency programs and in the legal assistance and advice you provide to SBA officials and employees.
- c. This SOP does not alter the responsibility of program managers for the proper administration and delivery of SBA's assistance programs within their area of responsibility.
- d. This SOP is for internal purposes and cannot be cited as precedent by third parties. SBA counsel should not rely on this SOP as a definitive statement of the law or cite it as precedent.

2. How is SBA's Legal Function in the Field Organized?

The General Counsel is responsible for providing legal assistance and advice to the Administrator and other Agency officials on the development and execution of Agency policies, programs, and activities. The General Counsel also has full responsibility for the technical and professional guidance of all SBA counsel. The Deputy General Counsel (DGC) and associate general counsels assist the General Counsel by providing professional and technical guidance and supervision over field activities of Agency

attorneys.

- a. The DGC is responsible for coordinating field legal activities performed by district, branch, and center counsel. Two senior area counsel who report to the General Counsel through the DGC assist this official. The senior area counsels are also available to provide legal advice to the regional administrators.

Directors and program managers in specialized loan making and servicing centers provide administrative support and day-to-day supervision of district counsel and supervisory attorneys. The General Counsel provides technical and professional guidance and supervision over all legal personnel in field offices.

- b. The Associate General Counsel for Finance (AGC/Finance) is responsible for providing legal guidance to the Finance and Capital Access programs.
- c. The Associate General Counsel for Litigation (AGC/Litigation) is responsible for coordinating the services of debt collection litigation units and the legal activities of the Loan Servicing and Liquidation Office. Two senior field litigation counsels who report to the General Counsel through the AGC/Litigation assist this official.
- d. The Associate General Counsel for General Law (AGC/General Law) is responsible for coordinating the activities of the Administrative Law Litigation Unit. A senior field litigation counsel who reports to the General Counsel through the AGC/General Law assists this official.

3. What is the Primary Responsibility of Field Counsel?

District counsel, supervisory attorneys, and attorney/advisors give legal advice to district directors, other field office managers, and field personnel on all aspects of SBA's programs and on administrative and employee relations matters. Establishment of a close working relationship between district counsel and the district director and other field managers is essential to providing effective and quality legal services to the field offices. A district counsel who is an integral part of the district director's management team is in a position to recognize and head off legal issues before they become problems.

4. What Authority Does Field Counsel Have?

- a. As SBA counsel, you are responsible for ensuring compliance with laws and regulations in all aspects of the Agency's activities in your local office. You have authority over loan closing and litigation. You also provide legal advice on processing, servicing, and liquidation matters.
- b. Since most of our loans are participation loans, field counsel must maintain effective working relationships with lenders' employees and outside counsel

responsible for closing, servicing, and collecting SBA loans.

- (1) You provide general training on legal issues related to SBA's processing, closing, servicing, and collection requirements and guidance on these matters when requested.
 - (2) You provide guidance to lenders on liquidation matters upon request by SBA or lender personnel.
 - (3) You consult with lender counsel on litigation matters and monitor the progress of lender serviced litigation cases.
- c. For direct and 504 loans, you are responsible for closing the loans and perfecting SBA's security interests in the collateral, as described more fully in chapter 4. You also provide legal advice to field personnel on processing, servicing, and collection matters. You provide general training in SBA closing and legal requirements related to loan servicing and collection. In addition, you provide advice to CDC personnel as to legal issues related to SBA policy on these matters.
 - d. You advise Portfolio Management (PM) personnel on legal issues related to servicing matters upon request.
 - e. You advise PM personnel on legal issues related to liquidation matters upon request.
 - f. You have primary authority for litigation matters and work closely with PM personnel to expedite the conclusion of litigation.
 - g. Effective servicing, collection, liquidation, and litigation of direct and SBA serviced loans requires that you maintain close, effective, and cooperative working relationships with PM personnel.

5. What are Some of Counsel's Duties?

Among your duties as counsel, you must do the following.

- a. Review loan authorizations (except PLP and LowDoc authorizations) as set forth in paragraph 3-11 of this SOP;
- b. Close 504 loans;
- c. Review certain SBA Form 327s, "Modification or Administrative Action" (see chapter 5);

- d. Review guaranty loan documents and lender actions prior to purchase;
- e. Review liquidation/litigation plans;
- f. Review administrative actions pertaining to compromises;
- g. Review charge-off actions;
- h. Handle SBA direct litigation and oversee lender litigation cases;
- i. Advise the district director, program managers, and field personnel on all legal matters including:
 - (1) EEO matters;
 - (2) Disciplinary and adverse actions;
 - (3) FOIA/Privacy Act matters; and
 - (4) Standards of conduct matters;
- j. Prepare and review legal documents;
- k. Respond to subpoenas;
- l. Review procurement matters including:
 - (1) 8(a) Business Development (8(a)BD) matters;
 - (2) Government contracting matters; and
 - (3) Certificate of Competency decisions;
- m. Report to the General Counsel or designee, as needed, when laws, regulations, SOPs, or Agency policy are not followed; and
- n. Report to the Office of Inspector General all known or suspected irregularities in the administration of the Agency's programs or regulations.

6. Who Evaluates My Performance as Counsel?

Employee	Rating Official	Reviewing Official
District Counsel	District Director	Senior Area Counsel
District Office Attorney	District Counsel	District Director
Branch Counsel	Branch Manager	District Counsel
Branch Office Attorney	Branch Counsel	Branch Manager
Litigation Unit Senior Field Litigation Counsel	AGC/Litigation	General Counsel
Litigation Unit Attorney	Senior Field Litigation Counsel	AGC/Litigation
Administrative Law Litigation Unit Senior Field Litigation Counsel	Chief Counsel for Administrative Law	AGC/General Law
Administrative Law Litigation Unit Attorney	Senior Field Litigation Counsel	AGC/General Law
Commercial Loan Servicing Center Counsel	Loan Servicing Center Director	Senior Area Counsel
Commercial Loan Servicing Center Staff Attorney	Loan Servicing Center Counsel	Loan Servicing Center Director
Specialized Loan Making Center Counsel	Center Director	Senior Area Counsel
Loan Servicing (LS) & Liquidation Office (LO) Supervisory Counsel	Senior Field Litigation Counsel w/input from the LS & LO Director	AGC/Litigation
Loan Servicing & Liquidation Office Staff Attorney	LS & LO Supervisory Counsel	Senior Field Litigation Counsel
Home Loan Servicing Center Counsel	Center Director	Senior Area Counsel
Senior Area Counsel	Deputy General Counsel	General Counsel

CHAPTER 2 REPORTING REQUIREMENTS

1. What are Senior Area Counsels' Reporting Requirements?

Senior area counsel must submit a report to the General Counsel quarterly. The report will include a compilation of the district counsel reports. You must file the report for each quarter with the General Counsel on or before the 25th calendar day of the next quarter.

2. What are the Field Counsel Reporting Requirements?

- a. District counsel must submit a report to the senior area counsel quarterly. You must file the report with the senior area counsel on or before the 10th calendar day of each calendar quarter. If you supervise branch counsel, your report will include the statistical and narrative reports of the branch counsel as an attachment.
- b. Branch counsel must submit a report to the district counsel quarterly. You must file the report with the district counsel on or before the 5th calendar day of each calendar quarter.

3. What Must the Quarterly Report Contain?

The quarterly report must contain both a "Field Counsel Workload Statistical Report," SBA Form 2084 (appendix 2a), and a narrative summary. The narrative summary must contain a concise but comprehensive discussion of, at a minimum, the items listed below. All items must be addressed in some detail.

- a. Identification of legal and administrative problems and trends.
 - (1) Any steps taken to address these problems and trends; and
 - (2) Any proposed solutions referred to a higher level.
- b. A discussion of unique or sensitive cases.
- c. A discussion of any personnel matters that affect promotions, achievements, or awards received by district level staff:
 - (1) Any training either inside or outside the Agency;
 - (2) Any recommendations for attorney commendations;

- (3) Any proposed promotions;
 - (4) Any achievements; and/or
 - (5) Any awards.
- d. A summary of any other significant activities or cases.
 - e. Other matters of relevance counsel decides to include.

4. What is a Quality Review of Legal Services?

A quality review by senior area counsel (or their delegates) of legal services consists of an analysis of field counsel's legal work and achievement of goals. The reviews will be conducted simultaneously with other program reviews, or independently. Reviews will occur within a 3-year cycle, subject to budget constraints. Among items reviewed are:

- a. Timeliness and quality of advice;
- b. Timeliness and quality of legal work;
- c. Effectiveness of the working relationship with Agency staff and outside resources;
- d. Effectiveness of the relationship with the Department of Justice/U.S. Attorney's office; and
- e. Achievement of goals and targets as established by area counsel and the district director.

CHAPTER 3 LOAN PROCESSING

1. What is Counsel's Role in Loan Processing?

You, as SBA counsel, advise finance personnel with respect to any legal issue that arises during loan processing. You:

- a. Address and work with finance personnel to resolve eligibility issues;
- b. Review loan authorizations as set forth in paragraph 11 of this chapter;
- c. Review documents; and
- d. Otherwise ensure that the Agency's interests are protected.

2. What is Counsel's Role in Eligibility Determinations?

- a. As counsel, you confer with and advise finance personnel on eligibility issues to ensure compliance with all applicable statutes, regulations, Agency policy, procedures, and State and local laws. You may review any loan application for eligibility.
- b. The loan officer must refer unusual or complex eligibility issues to counsel.

3. When Does Counsel Review Whether a Business is Eligible for SBA Assistance?

- a. You examine eligibility when requested by finance personnel. You also examine eligibility when reviewing the loan authorization.
- b. Most small businesses that are independently owned and operated, and not dominant in their field, are eligible for SBA assistance. The basic eligibility requirements are listed in 13 CFR §120.100.

4. What Businesses are not Eligible for SBA Assistance?

Ineligible businesses are identified in 13 CFR §120.110.

5. Are Businesses with a Religious Component Eligible for SBA Assistance?

- a. Otherwise eligible small businesses are not ineligible for SBA financial assistance merely because they offer religious books, music, ceremonial items, or other religious products for sale or provide services that encourage moral and ethical

values. To be ineligible, a business must be principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious belief. To determine if the business is so principally engaged, the overall activities and business environment must be considered. Finance personnel must refer to counsel all applications for financial assistance by businesses whose activities appear to involve teaching, instructing, counseling, or indoctrinating religion or religious beliefs. You must review these applications and provide a legal opinion on the eligibility of the business for such assistance. Complete the "Religious Eligibility Worksheet," SBA Form 197, appendix 3a, to determine the eligibility of a business.

- b. You, as SBA counsel, must consider:
 - (1) The nature, extent, and overall effect of the religious component; and
 - (2) Whether the business is connected or affiliated with a religious organization.

- c. When asked to review any such application, you must give a legal opinion as to the impact of the religious component on eligibility. If you conclude that the applicant is eligible, no further legal review is required. If you conclude that the applicant is or may be ineligible, you must forward the case file and a summary memorandum of your opinion to the Office of General Counsel (Attn: Office of Litigation). The General Counsel (or a designee) will make the final Agency determination as to ineligibility under this rule.

- d. The following for-profit entities, when not affiliated with a religious organization and not engaged in religious teaching, instructing, counseling, or indoctrination, are typically eligible:
 - (1) Stores that sell tangible products such as religious books, music, artifacts, ceremonial items, and gifts;
 - (2) Broadcasters which play religious music;
 - (3) Cafes and clubs which present religious music;
 - (4) Publishers of newspapers, journals, or other publications which include articles dealing with religious practices or beliefs; and
 - (5) Producers of computer software that contain information about religious practices or beliefs.

6. What is an Eligible Passive Company and How Do I Determine if One is Eligible?

- a. An eligible passive company:
 - (1) Is a small entity or trust that does not engage in a regular and continuous business activity;
 - (2) Leases real or personal property to an operating company for use in the operating company's business; and
 - (3) Complies with the conditions set forth in 13 CFR §120.111.
- b. Complete the “Eligible Passive Company Worksheet,” SBA Form 2085, attached as appendix 3b, to determine whether an application submitted by a passive company is eligible.

7. Are Businesses that Have a Component that Appeals to a Prurient Sexual Interest Eligible for SBA Assistance?

- a. A business is not eligible for SBA assistance if it presents live performances of a prurient sexual nature or it derives more than a de minimis gross revenue, directly or indirectly, through the sale of products or services or the presentation of any depictions or displays of a prurient sexual nature. The finance division must refer to counsel all loan applications by businesses whose activities appear to involve the sale of products or services, or the presentation of performances, depictions, or displays that appeal to a prurient sexual interest. You must review these applications and provide a legal opinion on the business' eligibility.
- b. You, as SBA counsel, must consider:
 - (1) Whether the nature and extent of the sexual component causes it, in view of community standards, to be prurient (even if lawful, the business may be prurient); and
 - (2) Whether the business receives more than de minimis gross revenue from the prurient sexual component.
- c. You must give a legal opinion as to the impact of the sexual component on eligibility. If the finance division does not agree with your opinion, make every effort to reach an accord. If an accord cannot be reached, follow the procedures set out in paragraph 10 of this chapter.
- d. For purposes of this regulation, de minimis means the business derives such a small portion of its revenue from the specified activity, or activities that it has no significant impact on its operations.

8. What is the Process for Reviewing Franchise Eligibility?

- a. To streamline its review of franchise eligibility, SBA has established a Franchise Registry (“Registry”). Participation in the Registry is voluntary. The Registry lists those franchisors and franchise programs whose standard Franchise Documents comply with SBA eligibility requirements. Although most franchisors have only one program, many have several programs. For example, a fast food franchisor, such as Subway or Burger King, might have a regular program, a co-branding program, a kiosk program, and a food court program. The Franchise Documents for each program are different. Registry registrations are by franchisor and program. The registration will indicate whether it is for the franchisor’s standard program or a special program.
- b. If a franchisor’s program is on the Registry, you may rely upon the registration to determine franchise eligibility, subject to compliance with Agency policy and procedure. If the franchisor’s program is not registered, you should continue to use your current procedures to determine franchise eligibility, including review of the Franchise Documents.
- c. You can access the Registry on the Internet at www.franchiseregistry.com, or through a link on SBA’s Home Page. A public portion of the Registry lists those franchise systems qualifying for expedited eligibility review. The Registry began accepting submissions on June 1, 1998.
- d. There is also a private portion of the website which only Lenders, CDCs, and SBA legal and financial personnel can access. The private portion contains the franchise agreements and other documents that franchisees must sign (“Franchise Documents”) for registered franchise systems. Provisions of the Franchise Documents related to eligibility are marked so that users can locate them easily. SBA has established a simple user name and password for all SBA field counsel and field financial assistance personnel. All field staff will use the same user name and password. The Office of General Counsel will give separate user names and passwords to appropriate Headquarters personnel. The SBA password is for SBA personnel only and should not be given to anyone outside SBA.
- e. PLP and *SBAExpress* Lenders, and PCLP CDCs, should follow the procedures in subparagraphs f.(1) through (13) below, and the attached eligibility guidelines.
- f. Field counsel must use the following process to determine franchise program eligibility for individual loan applications.

(1) Who Determines Franchise Program Eligibility?

Generally, you determine franchise program eligibility. You must

determine whether the franchisee is owned, controlled by, or otherwise affiliated with the franchisor. To find eligibility, you must confirm that the Franchise Documents do not give rise to such ownership, control, or affiliation. Under certain circumstances discussed below, SBA's Franchise Eligibility Unit counsel will make the eligibility decision.

(2) Who are the Franchise Eligibility Counsel?

SBA will coordinate its legal review of franchise program eligibility through the Minnesota District Office, with Michele Courneya as Senior Franchise Counsel. SBA has contracted with a private sector contractor, FRANDATA, to assist in this review. SBA field counsel may contact Michele for assistance. PLP and SBAExpress Lenders, and PCLP CDCs may consult with FRANDATA if they need assistance.

(3) What is the First Step in Reviewing Eligibility?

When you receive a franchisee's application for financial assistance, you must first check the Registry to see if the franchise program is listed there. Examine the application and the Franchise Documents or certification to ascertain the program of the franchisor for which the applicant is requesting financial assistance. If a specific program is not stated, you should consider the application to be for the franchisor's standard program. (Most franchisors have only one program.) Each registration on the Registry indicates if it is for a standard program or a special program. If the application for financial assistance, Franchise Documents, or certification specifies a different program from any of the franchisor's programs on the Registry, you must review the Franchise Documents and determine franchise program eligibility as you would for any franchisor not registered. You may consult with FRANDATA or the Senior Franchise Counsel for assistance.

(4) What Must the Application Include if the Franchisor's Program is Registered?

- (a) If the franchisor's program is listed on the Registry as eligible for SBA financial assistance, the application must include one of the following certifications from the franchisor's counsel:
- (i) A "Certification of No Change on behalf of Registered Franchisor," SBA Form 2086 (see appendix 3c), stating that there are no changes in the franchisor's Franchise Documents in any way relevant to SBA's eligibility guidelines since the initial registration or last revision date in the Registry ("Relevant Changes");

(ii) A “Certification of Change on behalf of Registered Franchisor,” SBA Form 2087 (see appendix 3d), listing all relevant changes.

(b) If the application does not include one of these certifications, you should request one from franchisor’s counsel or the applicant.

(5) If There is a Certification of No Change, Must You Look at Anything Else?

No. If there is a Certification of No Change, you should consider the franchise eligible.

(6) If There is a Certification of Change, What Do You Do?

If there is a Certification of Change, forward copies to FRANDATA and the Senior Franchise Counsel.

(7) What Will FRANDATA Do When it Receives the Certification of Change?

FRANDATA will obtain from the franchisor an electronic copy of the Franchise Documents with the Relevant Changes clearly marked by highlighting or redlining, a completed franchise eligibility worksheet (“Worksheet”) addressing all Relevant Changes in the Franchise Documents, and a \$500 fee. (You may view and download a sample Worksheet on the Registry website.)

(8) What will the FRANDATA Do with the Worksheet and Franchise Documents?

FRANDATA will review the Worksheet and Franchise Documents to assess whether the franchise program still complies with SBA’s eligibility guidelines. It then will submit a recommendation to the Senior Franchise Counsel, who will determine eligibility.

(9) What Happens After the Senior Franchise Counsel Receives FRANDATA’s Recommendation?

(a) If the Senior Franchise Counsel determines that the franchise program continues to be eligible, she will notify FRANDATA to place the revised Franchise Documents in the Registry and record the review date, and will notify the SBA field counsel, PLP or SBAExpress Lender, or PCLP CDC of the decision.

- (b) If the Senior Franchise Counsel determines that Relevant Changes make the franchise program ineligible, she will work with the franchisor's counsel and the SBA field counsel, PLP or *SBAExpress* Lender, or PCLP CDC in an attempt to resolve the issues. The Senior Franchise Counsel may ask the SBA field counsel, PLP or *SBAExpress* Lender, or PCLP CDC to take primary responsibility for the negotiations with the franchisor's counsel.
 - (i) If the Senior Franchise Counsel subsequently determines that the franchise program continues to be eligible, he or she will notify FRANDATA to place the revised Franchise Documents in the Registry and record the review date, and notify the SBA field counsel, PLP or *SBAExpress* Lender, or PCLP CDC, of the decision.
 - (ii) If the Senior Franchise Counsel determines that the franchise program is no longer eligible, she will notify FRANDATA to delete the eligibility record in the Registry, and notify all SBA field counsel, PLP and *SBAExpress* Lenders, or PCLP CDCs, of the decision.

(10) What Procedures Do I Use for Franchise Programs that are Not Registered?

If the franchise program has chosen not to participate in the Registry, you must continue to review the franchisor's Franchise Documents and determine franchise program eligibility each time a franchisee or prospective franchisee of that program applies for SBA financial assistance. You may consult with the Senior Franchise Counsel for assistance.

(11) What Should You Do if You Determine that the Franchise Program is Ineligible?

If you determine that a franchise program not on the Registry is ineligible, you must notify the Senior Franchise Counsel by E-Mail, indicating the reason for the ineligibility. If the Senior Franchise Counsel agrees, she will forward the information to all field counsel, and PLP and *SBAExpress* Lenders, and PCLP CDCs.

(12) What Should You Do if an Applicant Says the Franchisor's Program is Registered, But it is Not Listed on the Registry?

If the franchisor's program is not listed on the Registry, but an applicant for financial assistance submits a Certification with his or her application, call FRANDATA to find out if the franchisor has applied for registration. If it has, notify the Senior Franchise Counsel and ask FRANDATA to expedite review and registration. If it has not applied for registration, perform the same review you do if a franchise program is not on the Registry.

(13) Are there any Audits of Franchisors' Certifications?

Franchisors file their Franchise Documents with State regulators annually and after making significant amendments. FRANDATA will use the State filings to review 10 percent of the Certifications of No Change. The review will compare the Franchise Documents on the Registry with the franchisor's State registered Franchise Documents. The contractor will give the Senior Franchise Counsel a report specifying any provisions found in the State registered Franchise Documents that differ from those in the Franchise Documents on the Registry. If any changes cause the franchise program not to comply with SBA's eligibility guidelines, or if the Certification of No Change proves to have been materially false, the Senior Franchise Counsel will notify FRANDATA to delete the system's eligibility record from the Registry, and may take other actions appropriate under the circumstances.

- b. You and Franchise Eligibility Counsel should follow the eligibility guidelines set forth in appendix 3e in making franchise determinations. Appendix 3f contains a sample eligibility opinion.

Note: There are special credit conditions and requirements which may apply to franchise businesses and with which you should be familiar. See SOP 50 10(4), Subpart A, Chapter 5, section 6f.

9. What is Counsel's Role in Determining Whether a Business is Small for Loan Purposes?

- a. If there is a question whether an applicant qualifies as small under SBA's size standards (13 CFR §121), finance personnel must consult with counsel. Most often, your role will involve questions of affiliation. Affiliation is fully defined in 13 CFR §121.103. It exists where one concern controls, or has the power to control another concern, or where a third party has the power to control both. You must consider, at a minimum, the following factors:

- (1) Common ownership;
 - (2) Common management;
 - (3) Contractual relationships;
 - (4) Family relationships;
 - (5) Prior business relationships;
 - (6) Economic dependency; and/or
 - (7) Stock ownership.
- b. For further information on Size Determinations, see chapter 9 in this SOP.

10. What Happens When Counsel and Finance Disagree on a Business' Eligibility?

- a. If field counsel determines that an applicant is not eligible for SBA assistance and finance personnel do not agree, every effort should be made to reach an accord. If these efforts fail, the finance chief and the district counsel must consult with the district director. If the district director does not concur with field counsel, the issue and case file must be referred to Headquarters for resolution. Each person must prepare a memorandum summarizing his or her position and forward it through the district director to the Associate Administrator for Financial Assistance (AA/FA) or his/her designee. The AA/FA may consult with the Office of General Counsel for legal advice. If the AA/FA and General Counsel do not agree on the determination, they will submit the eligibility issue to the Administrator for final decision.
- b. You must immediately advise the senior area counsel of every instance where the issue is not resolved at the district level and the matter is referred to Headquarters.

11. What is Counsel's Role in Reviewing Loan Authorizations?

- a. For the first 6 months after the effective date of this SOP, SBA field counsel will review 504 and 7(a) final loan authorizations (except Preferred Lenders Program (PLP) and LowDoc authorizations) to ensure that:
 - (1) The loan authorization complies with all State and Federal law, and Agency policy, rules, and regulations;
 - (2) The language is clear;
 - (3) Only necessary provisions are included; and/or

- (4) Boilerplate changes for a specific loan, if any, are acceptable.
- b. During the 6-month period, SBA field counsel will track the authorizations reviewed and any changes that were required, in order to determine the necessity to continue reviewing all 504 and 7(a) loan authorizations (except PLP and LowDoc authorizations). At the end of the 6-month period, based on the information gathered by field counsel, OGC and OFA will determine whether field counsel must continue to review all 504 and 7(a) loan authorizations (except PLP and LowDoc authorizations).
- c. You also must review and approve all changes to the loan authorization made subsequent to your initial review if any are made prior to issuing the loan authorization. See paragraph 13 below for LowDoc loan authorization review procedures.

12. How Does Counsel Ensure that Loan Authorizations Contain all Necessary and Appropriate Provisions?

As SBA counsel, you confer with and advise finance personnel with respect to appropriate loan authorization provisions. In addition, you:

- a. Periodically review all boilerplate loan authorization provisions to ensure continued compliance with statutes, regulations, policy, procedures, and State and local law;
- b. Propose changes in authorization provisions to the Authorization Standardization Document Committee;
- c. Draft appropriate specialized authorization provisions unique to the loan where necessary; and/or
- d. Must use the "Loan Authorization Checklist," SBA Form 2088, attached as appendix 3g.

13. What is Counsel's Role with Respect to SBA's LowDoc Program?

Generally, LowDoc loans will be processed in a LowDoc Processing Center. LowDoc center counsel need not review LowDoc authorizations or documentation. However, if Finance plans any deviation from the previously approved LowDoc boilerplate language, Finance must refer the changes to you for review and approval. Finance personnel should use counsel as a resource for any issues that arise with respect to a proposed LowDoc loan. For LowDoc loans that are declined in a LowDoc processing center and re-considered in a district office, field counsel should follow the guidelines set forth above for LowDoc center counsel.

14. What Happens When Counsel and Finance Disagree on Loan Authorization Provisions?

Counsel and finance personnel must work closely to ensure that the Agency is adequately protected. In this regard, where you and the loan officer disagree over the inclusion of a specific provision in the loan authorization, you must make every effort to reach some accommodation. If you cannot resolve the matter, you will refer the issue and the case file to the deciding official who will make the final determination.

CHAPTER 4 LOAN CLOSING

1. What are Counsel's Responsibilities for Loan Closing?

As SBA counsel, you have overall responsibility for closing all SBA loans. You have primary responsibility for closing direct loans. For 504 loans, you must fulfill the responsibilities in paragraphs 4-4 and 4-5. For guaranty loans, you must fulfill the responsibilities in paragraph 4-2.

2. What are Counsel's Responsibilities for Guaranty Loan Closing?

- a. Most SBA loans are made through financial institutions under various SBA guaranty programs. District counsel will develop a general loan closing instruction letter that will be sent to the participating lender along with the loan authorization. A sample letter is provided in appendix 4a.
- b. Field counsel is often asked to provide advice and assistance to SBA personnel, lender personnel, and lender counsel as to the closing of 7(a) guaranty loans. You should provide guidance as to SBA policy and procedures, but should not provide legal advice. Counsel's views are often sought in the following areas:
 - (1) Environmental issues;
 - (2) Title issues;
 - (3) Lease issues;
 - (4) Loan disbursement issues; and/or
 - (5) Adverse change issues.
- c. A participating lender must certify to you that:
 - (1) It closed the loan in accordance with the provisions of the loan authorization; and
 - (2) The date of the note, the date of the first and final disbursements, and the date the guaranty fee was mailed to SBA's Denver Finance Center. See certification form (SBA Form 2004) provided in appendix 4b.
- d. The Lender must submit all "Compensation Agreements," SBA Form 159, to the Finance Division in its local field office. The Finance Division will forward all SBA Form 159s for legal fees over \$1,000 to the Legal Division for review.

3. What are Counsel's Responsibilities for Direct Loan Closing?

You, as SBA counsel, are responsible for:

- a. Preparing loan closing documents;
- b. Conducting the loan closing;
- c. Perfecting SBA's security position; and
- d. Authorizing the disbursement of direct loans.

4. What are Counsel's Responsibilities for Non-Expedited 504 Loan Closing?

a. You, as SBA counsel, must:

- (1) Review the loan closing package submitted by the CDC (use the "Sample 504 Loan Closing Checklist," SBA Form 2089, in appendix 4c as a guide in your review);
- (2) Verify that the information on the Debenture, Note, Servicing Agent Agreement, and Use of Proceeds is accurate and complete; and
- (3) Determine that the loan has been closed in accordance with the Authorization, this SOP, SBA regulations, and applicable State and Federal statutes.

b. You must send the following documents by Federal Express to the Central Servicing Agent (CSA):

- (1) Original Debenture;
- (2) Copy of Note;
- (3) Copy of the Use of Proceeds; and
- (4) Original Service Agent Agreement.

c. You must send copies of only the following documents to the Office of General Counsel on or before each cutoff date:

- (1) Opinion of CDC counsel;
- (2) Opinion of SBA counsel;

- (3) Debenture;
- (4) Note; and
- (5) CDC's corporate resolution.

5. What are Counsel's Responsibilities for 504 Closings with a Priority CDC Using a Designated 504 Closing Attorney?

SBA counsel must:

- a. Perform a limited ministerial review of the 504 loan closing documents listed in appendix 4d (you may rely upon the Opinion of CDC Counsel and CDC Certification with respect to all other documents, actions, and decisions);
- b. Verify that the information on the Debenture, Note, Servicing Agent Agreement, and Use of Proceeds is accurate and complete;
- c. Determine that the loan has been closed in accordance with the Authorization, this SOP, SBA regulations, and applicable State and Federal statutes (you may rely upon the Opinion of CDC Counsel and the CDC Certification in making your determination);
- d. Fulfill the responsibilities in paragraphs 4-4(b) and (c); and
- e. SBA counsel must conduct random reviews of Priority CDC closing packages. The number and frequency of audits is at your discretion, provided that, for each designated attorney, each quarter, 10 percent of that attorney's packages or one such package, whichever is more, is audited. You may use the checklist in appendix 4c as a guide.

6. Are There any Conflict of Interest Issues that District Counsel Must Consider Regarding Closing Attorneys?

- a. Because of potential conflict of interest issues, you must consider the relationship between a CDC and an attorney.
- b. In the following relationships between an attorney and a CDC, the attorney is considered, as a matter of policy, not to be independent:
 - (1) A CDC's in-house counsel; and
 - (2) An attorney employed by a state or municipal CDC, or a governmental affiliate of the CDC.

- c. The attorney may not be a Designated Attorney for the CDC and you may not accept an Opinion of Counsel from the attorney in an expedited closing for that CDC. The attorney may handle unexpedited closings for the CDC and you may accept an Opinion of Counsel from the attorney in an unexpedited closing.
- d. A CDC may retain an outside attorney to do all of its closings for a fixed fee.
- e. An attorney who is a member of a CDC may be a Designated Attorney for the CDC and may handle all closings, expedited and unexpedited.
- f. An attorney who is a member of a CDC's loan committee is ineligible to handle closings (expedited and unexpedited) for the CDC.
- g. In the following relationships, you must consider the entire relationship between the attorney and the CDC to determine how much influence or control the attorney has in the operation of the CDC. If you conclude the attorney's relationship with the CDC is so close that there is a conflict of interest or an appearance of a conflict of interest if the attorney closes loans for the CDC, the attorney may not handle closings (expedited or unexpedited) for the CDC:
 - (1) An attorney who is a member of the CDC's board of directors; and
 - (2) An attorney who is an officer of the CDC.

CHAPTER 5 LOAN SERVICING AND LIQUIDATION

1. What is Counsel's Role in Servicing?

You, as SBA's legal counsel, provide legal support, including advice, comments on 327 actions, and necessary document preparation and review. You should be thoroughly familiar with the SOP 50 50, "Loan Servicing."

2. What is Counsel's Role in Liquidation?

- a. You provide legal support, including advice and comments on 327 actions, and necessary document preparation and review. You should be thoroughly familiar with the SOP 50 51, "Loan Liquidation and Acquired Property."
- b. In addition, you have primary responsibility for all liquidation cases classified as "in litigation." All credit issues must be referred to the PM staff.

3. What is Counsel's Role in the Review of 327 Actions Referred to Legal?

- a. You must review the servicing loan officer's comments, recommendations, accompanying documents, and the loan file. If correspondence is required, a copy of the proposed letter should accompany the 327 action for attorney review. You must also comment on the legal sufficiency of the documents.
- b. The review should ensure that the recommendation is consistent with SBA regulations, SBA policy, and applicable law.
- c. You must make substantive comment on any action referred for legal review. You should avoid the phrases "Concur" and "No legal objection" whenever possible.
- d. If counsel's recommendations are not followed, the 327 action must have written justification by the approving official.

4. Which 327 Actions Must Counsel Review?

Not all 327 actions need to be reviewed. However, you must review the following types of actions:

- a. Exceptions to policy;
- b. Subordinations;

- c. Assumptions;
- d. Release or substitution of collateral;
- e. Release or substitution of obligors;
- f. Workouts;
- g. Purchase under the SBA guaranty, including "repairs" and denials of liability;
- h. Deeds in lieu of foreclosure;
- i. Review of liquidation plans;
- j. Payment of attorneys' fees;
- k. Transfers of a loan into litigation;
- l. Transfers of a loan out of litigation;
- m. All 327 actions on a case in litigation status;
- n. Purchase and/or payment of prior liens;
- o. Payment of real estate taxes;
- p. Compromise actions;
- q. All charge-offs;
- r. Any other document or 327 action with legal implications;
- s. Substantive revisions to the loan authorization;
- t. Conflict of interest/preference; and
- u. Acquisition of environmentally impaired property.

5. What Other 327 Actions Does Counsel Typically Review?

Besides the 327 actions listed above that counsel must review in each instance, you may also review a wide range of other 327 actions. The following list is not exclusive but is offered by way of illustration only:

- a. Transfers into liquidation status;

- b. Protective bids at foreclosure sales;
- c. Assignment for the benefit of creditors;
- d. Alterations in the terms of any loan instrument;
- e. Disposal of COLPUR;
- f. Transfers to Servicing from Liquidation; and
- g. Abandonment of collateral.

6. What is Counsel's Role in the Review of Subordinations?

You must review the legal aspects of recommended subordinations. Typical issues include:

- a. Lien priorities (e.g., effect of intervening junior liens);
- b. Legal sufficiency of documentation;
- c. Effect on enforceability of guaranties; and
- d. Effect on Obligor(s) and Standby Creditors.

7. What is Counsel's Role in the Review of Assumptions?

You must review the legal aspects of recommended assumptions. Typical issues include:

- a. Legal sufficiency of documentation;
- b. Effect on enforceability of guaranties; and
- c. Effect on Obligor(s) and Standby Creditors.

8. What is Counsel's Role in the Review of Release or Substitution of Collateral?

You must review the legal aspects of recommended releases or substitutions. Typical issues include:

- a. Legal sufficiency of documentation;
- b. Effect on enforceability of guaranties; and

- c. Effect on Obligor(s) and Standby Creditors.

9. What is Counsel's Role in the Review of Release or Substitution of Obligors?

You must review the legal aspects of recommended release or substitution. Typical issues include:

- a. Legal sufficiency of documentation;
- b. Effect on enforceability of guaranties; and
- c. Effect on remaining Obligor(s) and Standby Creditors.

10. What is Counsel's Role in the Review of Workouts?

- a. You must review the legal aspects of the proposed workout action. Typical issues include:
 - (1) Effect on enforceability of guaranties;
 - (2) SBA's lien position on collateral (e.g., effect of intervening junior liens, etc.);
 - (3) Effect on standby creditors, guarantors, and obligors (e.g., Statute of Limitation, waiver, etc.);
 - (4) Potential litigation actions, for example, bankruptcy filing by an obligor or guarantor; and
 - (5) Any other relevant legal issues.
- b. In SBA serviced cases, you are responsible for the preparation and/or review of all legal documents to implement the approved workout plan, including:
 - (1) Any modification to the note;
 - (2) Amendment or modification to the security agreement, deed of trust, or mortgage;
 - (3) Amendment or modification to a guaranty;
 - (4) Note receivables where appropriate;

- (5) Workout agreements signed by all parties to the transaction, if appropriate; and
- (6) Subordination or assumption agreements if appropriate.

11. What is Counsel's Role in Reviewing Purchase Actions?

- a. SBA's regulations regarding its obligation to honor its guaranty are at 13 CFR Sections 120.520 -- 120.524 (effective 3-1-96).
- b. When the lender asks SBA to honor its guaranty pursuant to the Guaranty Agreement (SBA Form 750), SBA's policy is to purchase as expeditiously as possible. Since SBA's guaranty to the lender is conditional, you must do a pre-purchase review unless the loan is sold on the secondary market (paragraph 5-13, below).
- c. You must review the servicing loan officer's comments, and all lender actions and documents. You must determine whether the lender complied with the provisions of SBA regulations, Guaranty Agreement, Authorization, SBA policy, and applicable law in making, closing, disbursing, and servicing the loan. You must also comment on the legal validity of the lender's documents. See the "Purchase Review Checklist," SBA Form 2090, in appendix 5a for a suggested purchase legal review checklist.
- d. The opinion in your report must specifically state whether the Agency is legally obligated under the Guaranty Agreement. If you have determined that the SBA is legally obligated to honor its guaranty, include the following statement in the legal comments: "**It is my opinion that SBA is legally obligated to honor its guaranty under the guaranty agreement.**" Comments must be on or attached to the loan officer's report.
- e. The recommendation of a denial of liability should not be an automatic response to a problem. (Note: only the Administrator can deny liability.) SBA can attempt an adjustment, or "repair," with the participant. An increase in the lender's share is appropriate when the SBA can quantify the anticipated attributable loss and the loss is less than the amount of the debt. The 327 action authorizing the repair must include the comments and concurrence of counsel. Also see SOP 50 51, on repair.
- f. If Finance determines that there was no timely notice, you must determine whether there is evidence to support Finance's determination that harm to the Agency did (or did not) result from the lack of timely notice. For a discussion of whether timely notice of default was given to SBA, see SOP 50 50.

- g. If district counsel determines SBA is not legally obligated to honor its guaranty, in whole or in part, the case file must be referred to Headquarters.

12. What is Counsel's Role in the Purchase of the Guaranteed Interest When the Loan Was Sold in the Secondary Market?

- a. To expedite purchase of the guaranteed interest from the Registered Holder, you will not conduct a review prior to purchase of the guaranteed portion. However, after purchase, you must conduct a legal review within an average of 5 days.
- b. If you conclude that deficiencies exist, you must advise the Finance supervisor who should initiate:
 - (1) Repair negotiations with lender; or
 - (2) A report and recommendation for the Administrator's authorization to sue the lender.

13. When May SBA Deny Liability to Purchase Under its Guaranty?

SBA's regulations regarding release of its liability on its guaranty are located at 13 CFR §120.524. The regulation makes it clear that SBA may deny liability for any material noncompliance with SBA's regulations or the terms of applicable loan documentation. Only the SBA Administrator has the authority to take final action on a recommendation from a field office for a denial of liability on an SBA loan guaranty. Such recommendations are forwarded from the DD, through OFA to the Administrator, with legal concurrence from OGC.

14. What Must Counsel Consider When Reviewing a Recommendation to Deny Liability?

At a minimum, you must:

- a. Ensure that the file has a full and complete statement of facts;
- b. Comment on the grounds for denial; and
- c. Comment on the likelihood of success in court if the lender contests the denial.

15. What is Counsel's Role With Deeds in Lieu of Foreclosure?

You must review the legal aspects of recommended deeds in lieu of foreclosure. Typical issues include:

- a. Status of title (e.g., existence of junior liens);
- b. Legal sufficiency of documentation;
- c. Preservation of deficiency claims;
- d. Potential or known environmental problems;
- e. Potential for merger of title;
- f. Risks in bankruptcy (e.g., preferences, trustee's avoidance powers, etc.);
- g. Effect on enforceability of guaranties; and
- h. Effect on Obligor(s) and Standby Creditors.

16. What is Counsel's Role in the Review of Non-PLP Lender Liquidation Plans?

- a. You must review the legal aspects of the recommended liquidation plan. This review should occur before commencement of liquidation or litigation. Typical issues include:
 - (1) Legal actions to be taken;
 - (2) Legal fees to be charged;
 - (3) Lien priorities (including taxes, judgments, etc.);
 - (4) Conflicts of interest;
 - (5) Pending litigation;
 - (6) Policy considerations; and
 - (7) Effect of proposed actions on liability of Guarantors, Obligor(s), or Standby Creditors.
- b. Your concurrence is required as to:
 - (1) The legal actions to be taken;
 - (2) The estimated time it should take to complete the process (e.g., 6 months, a year, etc.);
 - (3) The selection of lender's attorney; and

- (4) Legal fees to be charged (in considering fees of private counsel used by the liquidating lender, you should consider the complexity of the litigation case and the normal rate of fees charged in the local area).
- c. There should be an early meeting of the minds about the types of legal actions to be taken, where the action(s) will be filed, and the remedies to be sought.
- d. You must advise the lender or its counsel to provide you with copies of all pleadings, substantive correspondence and proposed settlements.
- e. See paragraphs 6-41 through 6-52, for more information concerning lender serviced litigation.

17. What is Counsel's Role in the Review of PLP Lender Liquidation Plans?

Generally, counsel reviews PLP lender liquidation plans at time of purchase. However, if the lender proposes any litigation, the requirements set forth in paragraphs 6-41 through 6-52 of this SOP apply.

18. What is Counsel's Role in Payment of Attorneys' Fees?

Before payment of attorneys' fees, you must concur in the amount to be paid. See the "Lender Outside Counsel Fee Checklist," SBA Form 2095, in appendix 5b, for the factors you should consider before approving legal fees for payment.

19. What is Counsel's Role Concerning Transfers of Loans into Litigation Status?

- a. You must concur with any request to transfer any loan to "in litigation" status. Beyond those cases where transfer is automatic, you must concur that there is collectibility.
- b. A transfer of the loan to "in litigation" status shifts primary responsibility for the loan to the Legal Division. All credit issues must be referred to the program officials.

20. What is Counsel's Role Concerning Transfers Out of Litigation Status?

District counsel is the approving official. See also paragraph 6-37, about when removing a case from litigation status is appropriate.

21. What is Counsel's Role in Any 327 Action on a Case in Litigation Status?

You must review and concur in approval of all 327 actions generated while the loan is in litigation status.

22. What is Counsel's Role in the Review of Purchase and/or Payment of Prior Liens?

You must review the legal aspects of recommended purchase and/or payment of prior liens. Typical issues include:

- a. Legal sufficiency of documentation;
- b. Lien priorities (including taxes, judgments, etc.);
- c. Ensure compliance with policy considerations;
- d. Consideration of assignment or release of prior liens;
- e. Effect on enforceability of guaranties; and
- f. Effect on remaining Obligor(s) and Standby Creditors.

23. What is Counsel's Role in the Payment of Real Estate Taxes?

The recommending official must provide all available tax documentation. You should consider, at a minimum, the following:

- a. Validity of the tax lien;
- b. Relative lien priorities;
- c. Any late charge or penalty;
- d. The date by which the tax should be paid;
- e. Practical and legal consequences of nonpayment; and
- f. Applicable redemption rights and expiration dates.

24. What is Counsel's Role in the Review of Compromise Actions?

- a. You must comment on, at a minimum, the following:
 - (1) The adequacy of the offer compared with other means of recovery;
 - (2) The legal sufficiency of the documents that support the offer; and
 - (3) Litigative risks and probabilities.
- b. See the "Compromise Review Checklist," SBA Form 2094, in appendix 5c for a suggested compromise legal review checklist.

25. What Must Counsel Consider When Reviewing a Charge-Off Recommendation?

SBA may charge-off a loan when all worthwhile avenues of recovery have been exhausted. To ensure maximum recovery, you must review all loans recommended for charge-off to determine whether legal action could result in additional recovery.

- a. If you concur in the recommendation to charge-off, you must include the following statement in the 327 action: "**No worthwhile avenues of recovery remain and cost of litigation will likely exceed recovery**" or "**No further avenues of legal recovery remain.**"
- b. If you determine that legal action could result in additional recovery, liquidation personnel will transfer the case into litigation (or the loan will remain in litigation). You will initiate recovery action using in-house resources and contractor assistance as appropriate.

26. Who is Responsible for the Preparation of Legal Documents?

- a. For SBA serviced loans, the Legal Division is responsible for ensuring the preparation of legal documents and must consider applicable laws and SBA policy. You are not limited to the clerical support under district counsel's direct supervision in the preparation of such documentation. You may use legally sufficient documents supplied by other parties.
- b. For lender serviced loans, the lender is responsible for preparing all documents.
- c. For development company loans, the CDC is responsible for preparing all documents.

27. Who is Responsible for Legal Review of Documents?

- a. For SBA serviced loans, the Legal Division is responsible for reviewing legal documents and must consider applicable laws and SBA policy.
- b. For lender serviced loans, the lender is responsible for reviewing all documents.
- c. For development company loans, the Legal Division is responsible for reviewing all documents prepared by the CDC.

28. In General, What Issues Should Counsel Consider When Reviewing Documents, Including Those to be Executed by the Agency?

Typical issues include:

- a. Compliance with applicable law;
- b. Legal sufficiency of documentation;
- c. Lien priorities (including taxes, judgments, etc.);
- d. Compliance with policy considerations;
- e. Effect on enforceability of guaranties;
- f. Effect on remaining Obligor(s) and Standby Creditors;
- g. Requests for indemnification from the SBA (policy considerations restrict the use of these agreements) (31 U.S.C. Section 1341);
- h. Warranties and covenants; and
- i. Delegations of authority.

29. What is Counsel's Role with Paid-in-Full Loans?

Upon proper notification that the loan is paid in full, the Legal Division is responsible for reviewing the documents necessary to release SBA's lien(s). You are not limited to the clerical support under district counsel's direct supervision in the preparation of documentation. Legally sufficient documents supplied by other parties may be used.

30. Does Counsel Participate in Liquidation Portfolio Reviews?

Yes, you will attend liquidation reviews at least semiannually, as well as those scheduled by the district director or his designee. You should consider the present status of the case, assistance needed from legal personnel, and appropriate collection strategies.

CHAPTER 6 LITIGATION

1. What is the Purpose of this Chapter?

- a. The purpose of the chapter is to provide internal direction and guidance to Agency attorneys in litigative matters.
- b. This chapter is for internal purposes and cannot be cited as precedent by third parties.
- c. SBA counsel should not rely on this chapter as a definitive statement of the law or cite it as precedent.

2. What is the Role of Counsel in Litigation?

Counsel has primary responsibility for all matters classified "in litigation." Once a case is classified in litigation, all contacts with the U.S. Attorney's Office, the courts, borrowers, guarantors, or other obligors (including their attorneys) must be through counsel or counsel's designees. Counsel should be consulted about the application of any funds received once a loan has been placed in litigation. Loans are classified "in litigation" by a 327 action. While counsel has primary responsibility for all matters classified "in litigation," you must keep the liquidation loan officer assigned to the case advised of significant litigation events and enlist his/her assistance for support services and credit matters.

3. How Often Should Field Counsel Hold Litigation Reviews?

A comprehensive litigation review covering all litigation cases will be conducted quarterly by district counsel.

4. What Should Counsel Do When a Case is Placed in Litigation?

- a. Review the loan file;
- b. Open a separate litigation file to organize the correspondence and documents associated with the case;
- c. Make a referral as detailed in paragraphs 6-8, 6-9, and 6-10 below.

5. What are Counsel's Recording Responsibilities for a Case in Litigation?

- a. Counsel is responsible for maintaining a record of the current status of the case and the chronological history of significant events associated with the case on the Liquidation Litigation Tracking System (LLTS) or its replacement.
- b. The LLTS (or its replacement) can also be used as a tickler system for tracking deadlines, meetings, and other scheduled future activities. As actions are completed, counsel will record the results in the appropriate litigation history.

6. How is a Referral to the Department of Justice (Central Intake Facility) Made?

- a. A Claims Collection Litigation Report (CCLR) is used for all referrals of debt claims by Federal agencies to the Department of Justice (Federal Claims Collection Standards, 4 CFR Sections 101-105). Addresses and mailing instructions may be found on the CCLR form. The referral should be completed within 45 days after the loan is placed "in litigation."
- b. In addition to the completed CCLR, **copies** of the documents required by the form must be included in all referrals.

7. Where are Debt Collection Referrals Sent?

- a. Referrals are made as follows depending on the amount of the claim.
 - (1) For debt collection (foreclosure/collection) actions:
Debts with a principal amount between \$600 and \$1 million are sent to the Nationwide Central Intake Facility (NCIF).
 - (2) A claim for less than \$600 may be referred to the NCIF if it is referred for program enforcement (to encourage compliance), or if it is a "piggyback" claim (a claim that accompanies one or more other claims against the debtor from the same agency).
 - (3) Principal amounts of more than \$1 million are sent to the Commercial Litigation Branch, Civil Division of the Department of Justice.
- b. If time is a problem, the original CCLR may be sent directly to the U.S. Attorney with a copy to the NCIF or other appropriate office. The referral should note the emergency nature of the action and any filing deadlines.
- c. Counsel should consult with their U.S. Attorney's Office on whether a duplicate referral should be forwarded to that office.

8. Where are Bankruptcy Cases Referred?

- a. Bankruptcy cases are referred to the NCIF unless the Agency files its own Proof of Claim (POC) and does not require assistance from the U.S. Attorney. (The Department of Justice does not require that bankruptcy be referred to it if the only action necessary is the filing of a proof of claim.)
- b. If the loan was referred through the NCIF before the bankruptcy was filed, the case can be sent directly to the U.S. Attorney of jurisdiction. (The NCIF is not notified because such cases are considered a status change as opposed to an entirely new case.)
- c. If the Agency's attorney will be handling the case under a Special Assistant U.S. Attorney (SAUSA) designation, only the first page must be referred.

9. How are other Litigation Cases Handled?

- a. For fraud cases, judgment lien renewals, or for Department of Justice concurrence of the Agency's proposal to suspend or terminate collection action:
 - (1) The referral package may be sent directly to the U.S. Attorney of jurisdiction; and
 - (2) Referrals accepted by the Department of Justice are directed to the Financial Litigation Unit (FLU) in the local U.S. Attorney's Office.
- b. Administrative law cases are coordinated with the Administrative Law Litigation Unit in Denver.
- c. Debt collection cases of a significant, precedential, or appellate nature must be coordinated with the relevant senior litigation counsel.
- d. Appellate or civil fraud cases, litigation in which the Agency is named as a defendant (except for 2410 cases), or suits against SBA lenders must be reported and coordinated with the Office of Litigation.

10. What is the Statute of Limitations for Filing a Civil Debt Collection Action?

- a. Generally, all actions seeking money judgments against obligors of SBA loans must be filed within 6 years after the right of action accrues (28 U.S.C. 2415). You should review current case law in your circuit to determine when the statutory period begins.

- b. For guarantors, most actions should be filed within 6 years after demand was first made for payment of the balance due on the loan. Caveat: In some jurisdictions the statute of limitations maybe interpreted as starting to run against SBA from the date of the obligor's default (28 U.S.C. §2415).

11. What Must be Considered When Filing a Civil Action?

In addition to the statute of limitations, counsel should consider the following:

- a. Junior Lienholders. All lienholders who perfect their liens after the United States should be included as party defendants in a foreclosure action. An updated Abstract of Title and/or a UCC search should be obtained in order to determine if there are any other liens against the property being foreclosed.
- b. Notice. Before a real estate mortgage foreclosure action is brought, you should comply with local foreclosure pre-filing notice provisions if any exist.
- c. Jurisdiction. The United States District Courts have original jurisdiction of all civil actions brought by the United States (28 U.S.C. §1345). The residence of the obligor, the location of the property involved, and/or the location where the loan was made will determine the appropriate District Court.
- d. Place of Filing. In Federal court, an action begins when the complaint is filed with the Clerk of the District Court. Counsel should review 28 U.S.C. 1391 and Rule 3, F.R.Civ.P.

12. What Should be Included in the Complaint?

A plaintiff doesn't need to set out in detail the facts upon which the claim is based, but certain allegations must be made as follows:

- a. Grounds upon which the court's jurisdiction depends. See 15 U.S.C. §634(b)(1) and 28 U.S.C. §1345.
- b. A "short and plain statement of the claim showing that the pleader is entitled to relief" (Rule 8(a)(2), F.R.Civ.P.). These allegations should be set forth in separate, numbered paragraphs, with each paragraph limited to a single set of circumstances. In pleading the existence of a key document, attach a copy to the complaint as an exhibit (Rule 10(c), F.R.Civ.P.).
- c. A demand for judgment for the relief the pleader seeks (Rule 8(a)(3), F.R.Civ.P.).

13. What Law is Applicable to Bankruptcy?

- a. Statutes. The Bankruptcy Code (Code) may be found in Title 11 of the United States Code. Certain Provision of Title 18, Crimes and Criminal Procedure, and Title 28, Judiciary and Judicial Procedure, also apply (See 28 U.S.C. §1334).
- b. Rules. The applicable rules include:
 - (1) The Federal Rules of Bankruptcy Procedure ("Rules");
 - (2) The Federal Rules of Civil Procedure ("FRCP");
 - (3) The Federal Rules of Evidence (See Rule 9017);
 - (4) The Local Bankruptcy Rules; and
 - (5) Local standing orders if any exist.
- c. Local Rules. No attempt has been made to incorporate the local bankruptcy rules into this SOP. Counsel must obtain a copy of the local rules and standing orders to use where applicable because of the diversity of district represented, counsel must obtain a copy of the local rules.

14. What Does the Bankruptcy Notice Mean?

- a. The Notice provides the date and place of the first meeting of creditors (also called "341 Hearing"), the bankruptcy case number, the name of the Trustee and the debtor's attorney, the nature of the debtor (a corporate or individual filing), and the final date for filing Proof of Claim, which may be set 90 days after the meeting of creditors. The Notice may also set the final date for filing an objection to discharge and date of discharge hearing. See Rules 2002 and 2003 and Rule 3002 for Chapters 7 and 13 of the Bankruptcy Code.
- b. Notice to the United States. If the debtor's schedules disclose any other Government agencies, notice must be sent to the U.S. Attorney and to the department, agency, or instrumentality of the United States involved. See Rules 2002(j), 7004(b), and 7012(a). Check your local Rules for specific directions on notice to Federal agencies.

15. What is the Effect of the Automatic Stay in Bankruptcy?

- a. The filing of the bankruptcy petition triggers the provisions of the Bankruptcy Code and an automatic stay is imposed on all creditors of the debtor. The stay precludes any "act" to obtain possession of or exercise control over the debtor or the estate of the debtor. A listing of the specific actions stayed may be found in 11 U.S.C. §362(a).

- b. See 11 U.S.C. §362(b) for exceptions and 11 U.S.C. §§362(c), (d), (e) and (f) for the duration of the stay. Before any of the prohibited actions may be taken, the Stay must be lifted by order of the Court. When in doubt whether a Motion to Lift the Stay is required, the prudent course is to file.
- c. Perfected Security Interest (UCC). Please see Uniform Commercial Code §9-403 for the duration and protection of a perfected UCC filing in bankruptcy. Filing a continuation statement does not violate the stay. See 11 U.S.C. §§362(b)(3) and 546(b)(1).

16. What May be Counsel's Role as a SAUSA in Bankruptcy?

- a. 9010 Notice. File an appearance and representation under Rule 9010 with the Bankruptcy Clerk, the debtor's attorney and other interested parties. The original and two copies should be sent to the Clerk with a copy to the debtor's attorney and the trustee. A Certificate of Service should be attached to the original filed with the Clerk.
- b. Letter to Bankruptcy Clerk. Forward a letter to the Bankruptcy Clerk requesting a copy of the Bankruptcy Notice (if not already obtained), the Statement of Financial Affairs, the Schedule of Assets and Liabilities, the Creditors' Matrix, and a list of the largest 20 Unsecured Creditors as filed by the debtor.
- c. Abandonment. You should provide the Bankruptcy Chapter 7 Trustee a copy of the 9010 Notice, the Proof of Claim, a request for abandonment, information on liens and indebtedness (including lien searches), and the estimated value of SBA's collateral. See Rule 6007 and your local rules.
- d. Notice to U.S. Trustee. Rules 1002(b), 1007(1), 1009(c), 2002(k), 5005(b), and 9034 require a copy of most filings to be sent to the U.S. Trustee.

17. What is Counsel's Role if the U.S. Attorney Handles a Case?

A referral to the U.S. Attorney's Office is only required when the Agency wants the U.S. Attorney to seek relief from the stay or take other appropriate action in the bankruptcy proceedings.

18. When is a Proof of Claim Filed in Bankruptcy?

Unless the Court orders otherwise, a Proof of Claim must be filed in all cases. If an indebtedness is in part secured and in part not secured, the claimant has a secured and an unsecured claim. See 11 U.S.C. §506.

19. When Can You Examine the Debtor on the Record?

At the Meeting of Creditors (Section 341 hearing), the creditors have the right to appear and examine the debtor. Subsequent examinations may be made by agreement or pursuant to Rules 2004 and 2005.

20. What Remedies Are Available in Bankruptcy for a Creditor?

Cash collateral protection, motion to convert or dismiss, request for abandonment, relief from the Bankruptcy stay, objection to discharge and/or dischargeability, objection to the disclosure statement, or objection to the plan. While most remedies are governed by motion practice, those listed in Rule 7001 are adversarial proceedings requiring the filing of a complaint.

21. What is Reaffirmation?

Once a debt has been discharged, the debtor cannot be forced to repay it. However, since a lien can survive Bankruptcy, the debtor may, to prevent foreclosure or for other reasons, with the creditor's consent, enter into a binding reaffirmation agreement prior to discharge. See 11 U.S.C. §524(c) and (d) and Rule 4008.

22. What is the Role of the Litigation Units?

Litigation units, under the auspices of the Office of Litigation, oversee debt collection litigation in district offices. The Eastern Litigation Unit oversees debt collection litigation in Regions I-V, and the Western Litigation Unit oversees debt collection in Regions VI-X. Litigation units enhance the efficiency and quality of litigation by creating a team approach to the delivery of litigative services. The units work directly with district office attorneys as well as U.S. Attorneys' Offices. The litigation units focus on reducing backlogs of cases and handling matters in district offices with legal staffs which are not able to handle all of their own litigation. The units accept specific cases on a referral basis, including complex or time consuming litigation that district office legal staff do not have time to pursue, and provide other forms of litigative support to the district offices.

23. What Cases Must Field Counsel Refer to Litigation Units?

Field counsel must refer to the litigation unit any new case "in litigation" that is not acted on within 45 days of its classification by referral to the U.S. Attorney's Office, instituting a court action, or taking other substantive litigative action."

24. What Cases May Field Counsel Refer to Litigation Units?

- a. Contested cases. Field counsel may refer contested matters in bankruptcy and foreclosure, whenever the complexity or time consuming nature of the proceedings causes the need for such assistance. This might include adversarial bankruptcy matters that require an evidentiary hearing or the use of expert witnesses.
- b. Specialized cases. Field counsel may refer cases requiring specialized expertise, such as those involving fraud, false claims, or environmental litigation. (Environmental cases will be coordinated with attorneys in the Office of Litigation.)
- c. Important or controversial cases. Field counsel may refer cases involving important or precedent setting legal issues.
- d. Potential lender serviced litigation. Field counsel should consider referring to the litigation units cases that otherwise would be assigned to participant lenders for handling. Such referrals normally would not include LowDoc or PLP lender serviced litigation, but can include other cases where there is no special justification for allowing the lender to pursue the litigation. Field counsel should evaluate cases to determine which ones might be handled more effectively by the litigation units, especially where outside legal fees could be significant and greatly reduce our overall dollar recovery.

25. What About Appeals?

- a. Field counsel must provide notice to the litigation units of all debt collection cases appealed to U.S. Courts of Appeals or Circuit Courts or appealed to district courts from bankruptcy courts.
- b. If an opposing party appeals a favorable decision in a debt collection case, the field office attorney may elect to serve as lead counsel on the appeal with the litigation unit attorney monitoring the appeal and providing research support.
- c. If the district office wishes to appeal an adverse decision, a litigation unit attorney will participate in the formulation of an appeal recommendation through the Office of Litigation to the Department of Justice, and will assist in the handling of any subsequent appeal.
- d. The Office of Litigation in Headquarters must be given notice of all appeals in non-debt collection cases.

26. What Cases are not Normally Referred to Litigation Units?

The following categories of cases normally are best handled in field offices:

- a. Lender serviced litigation involving only monitoring of cases;
- b. Routine bankruptcy matters, such as filing proofs of claims or uncontested motions for lifting the automatic stay and setoff; and/or
- c. Uncontested foreclosure actions.

27. What is the Procedure for Referring a Case to a Litigation Unit?

The field counsel may refer a case to the appropriate senior litigation counsel. The district counsel must record the number of cases referred to litigation units on the quarterly report filed with senior area counsel.

28. What Documentation Must Accompany Cases Referred to Litigation Units?

The following items must accompany cases referred to litigation units.

- a. Loan file. The entire loan file must be forwarded to the litigation unit. Upon request of the district office for documents in the file, the litigation unit will forward copies or, where appropriate, the original documents. If the district office needs the entire file, the litigation unit will return the file or a copy to the district office. Where appropriate, the litigation unit will copy all relevant documents and return the file to the district office.
- b. Collateral file. The district office maintains possession of the collateral file. A copy will be forwarded to the litigation unit with the original referral documents. Upon request of the litigation unit, the district office will forward the collateral file.
- c. CCLR. If the case has not been referred to the Department of Justice or Central Intake Facility, the referral to the litigation unit must contain, where needed, a CCLR (as required by Federal Claims Collection Standards) with the loan officer's portion of the form properly completed. The litigation unit will complete items 2, 3, 4, 8, 9, 10, 14, and 15 of the CCLR. Any items required in box 59 of the CCLR must accompany the referral to the litigation unit.
- d. Lien search. In the case of a judicial sale, the referral must contain lien searches under 6 months old on relevant real and personal property and, where required, a foreclosure commitment for title insurance.

- e. Appraisal. A current appraisal of any relevant collateral to be foreclosed.
- f. Certified Statement of Account. The referral must include a certified statement of account or a Certificate of Indebtedness and, if required by the local U.S. Attorney, a certified transcript of account.
- g. Taxes. If relevant, evidence of any outstanding taxes on real property.
- h. Cover memo or 327 action. A short cover memo or 327 action placing the account in litigation indicating what court action is necessary and stating any pertinent deadlines.

29. What is Field Counsel's Role after a Case is Referred to a Litigation Unit?

Primary responsibility for a case referred to a litigation unit for handling, rests with the trial attorney assigned to the case by senior litigation counsel. Field counsel will provide support when requested in cases referred to litigation units just as trial attorneys in the units provide support to field counsel on cases not referred to litigation units. The efficiency of litigation is enhanced by a team approach. The litigation unit may require field counsel to provide assistance including attending hearings, cosigning pleadings and providing other local support.

30. What is the SAUSA's Role after a Case is Referred to a Litigation Unit?

If the litigation unit attorney is not a SAUSA in the district where pleadings will be filed, and field counsel has a SAUSA appointment, the litigation unit attorney may request field counsel to cosign the pleading to expedite the litigative process.

31. What if There is no SAUSA Authority?

If neither the litigation unit attorney nor field counsel has SAUSA authority in a particular district court, the litigation unit attorney will file pleadings through the U.S. Attorney's Office.

32. To Whom is a Loan Coded When It is Referred to a Litigation Unit?

A loan referred to a litigation unit remains coded to the district office making the referral.

33. Which Office is Responsible for Expenses?

The district office referring the case to a litigation unit is responsible for providing liquidation support as well as for all expenses of enforced collection, excluding the travel costs of the litigation unit staff.

34. What About Compromises on Cases Referred to a Litigation Unit?

The litigation unit attorney will prepare comments on the litigative probabilities of a case when parties involved in a litigation case that has been referred to a litigation unit submit a compromise offer. The litigation unit attorney will forward the comments on the litigative probabilities, along with the case file, for final action by the district office. Field counsel will comment on Compromise actions.

35. What Procedure is Followed by Litigation Units Upon Completion of a Referred Case?

- a. The litigation unit attorney prepares a closing report summarizing the outcome of the case. The closing report and case file are forwarded to field counsel.
- b. The district counsel should incorporate the litigation unit attorneys closing report into a 327 action and remove the case from litigation, provided no other litigation on this loan is pending in the district office.

36. What Additional Support Can Litigation Units Provide?

Litigation units are available not only as resources that handle referred cases, but also to support field counsel on cases for which field counsel retains primary responsibility. This support may take the form of legal research, preparation of specific pleadings, brief writing, or general counseling on litigation matters. If field counsel wants assistance, senior litigation counsel will be contacted as soon as possible once the case becomes contested.

37. What is the Procedure for Obtaining Additional Litigation Unit Support?

District counsel should contact the senior litigation counsel to discuss the type and extent of assistance needed in a particular case. After reviewing the request, senior litigation counsel may assign a litigation unit attorney to provide assistance. Either the litigation unit attorney or both the litigation unit attorney and senior litigation counsel will contact field counsel to obtain further details and any documentation necessary to supply the requested support.

38. What Happens in the Event of a Dispute Between Field Counsel and the Litigation Unit Attorney?

If a question arises, senior litigation counsel will contact the field counsel. They should make every effort to reach an accord. If an accord is not reached, senior litigation counsel must elevate the matter to the Associate General Counsel for Litigation for a decision and will notify Senior Area Counsel of any matter so elevated.

39. What is the Procedure for Tort Claims?

- a. In all tort claims filed against the Agency or its employees acting within the scope of their employment, the office supervisory attorney must prepare a comprehensive report of the facts and law surrounding the claim, together with a recommendation for approval, denial, or settlement.

- b. For all claims, regardless of amount, where consultation with the Department of Justice is required under 13 CFR §114.107, the report must be referred to the Associate General Counsel for Litigation within 90 days of receipt of the claim. The Associate General Counsel for Litigation will then refer the matter to the Department of Justice.
- c. Unless consultation is required under b. of this paragraph, the following must occur:
 - (1) The office supervisory counsel has authority to deny all claims in an amount up to and including \$5,000.
 - (2) A claim of any amount where compromise, settlement, or approval is recommended must be forwarded with the comprehensive report to the Associate General Counsel for Litigation within 90 days after receipt of the claim.
 - (3) If the claim is above \$5,000 and the office supervisory counsel recommends denial, then counsel will forward the report to the Associate General Counsel for Litigation within 90 days after receipt of the claim. The Associate General Counsel for Litigation may approve or deny an award, compromise, or settlement for \$25,000 or less.
 - (4) For claims more than \$25,000, the Department of Justice must approve in writing, any award, compromise, or settlement in accordance with 13 CFR §114.107. The Office of Litigation will then advise the office supervisory counsel in writing of the final decision.

40. What is the Procedure for Responding to Subpoenas Served on an Agency Official?

- a. Civil subpoena: Authority to answer a civil subpoena is delegated to the office supervisory counsel unless it is of an unusual, sensitive, or precedential nature, or involves the Inspector General. Authority to answer civil subpoenas not delegated must be obtained from the Associate General Counsel for Litigation.
- b. Criminal subpoenas: Criminal subpoenas must be referred to the Office of General Counsel, Office of Litigation, with a copy to the Inspector General, Management and Legal Counsel Division. Both referrals must be prior to the subpoena's return date.
- c. If counsel approves compliance with the subpoena, SBA will comply.
- d. If counsel disapproves, SBA will not comply and will base such non-compliance on an appropriate legal basis.

41. What is the Policy of the Office of General Counsel with Respect to Lender Serviced Litigation?

It is the policy of the Office of General Counsel through SBA counsel to **manage** Lender Serviced litigation in order to:

- a. Ensure the highest recovery and protect the taxpayers' interest;
- b. Reduce the risk of adverse precedent;
- c. Control costs and fees;
- d. Prevent potential conflict of interest and preferential treatment; and
- e. Evaluate the effectiveness of lender's counsel.

42. What Lenders are Authorized to Conduct Litigation with Respect to SBA Guaranteed Loans?

All 7(a) lenders, Premier Certified Local Development Companies (PCLPs), and Certified Development Companies (CDCs) participating in the Liquidation Pilot Program are authorized to conduct litigation with respect to SBA guaranteed loans.

43. What is the Procedure for Litigation Conducted by SBA Participating Lenders?

SBA participating lenders with authority to handle litigation involving SBA guaranteed loans may handle litigation which SBA considers routine without SBA's prior approval, provided outside counsel for the lender proposes to charge fees and costs not exceeding \$5,000. Litigation which SBA considers non-routine will require a litigation plan approved in advance by SBA counsel.

a. What is litigation?

Any matter pending before a judicial or administrative tribunal.

b. What is routine litigation?

Routine litigation is uncontested litigation, such as non-adversary matters in bankruptcy and undisputed foreclosure actions, where there are no other outstanding loans made by the lender to the borrower or any other potential conflicts of interest on the part of the lender.

c. What is non-routine litigation?

All contested litigation is non-routine. Such litigation consists of those cases where factual or legal issues are in dispute and require resolution through adjudication. In addition, uncontested litigation is non-routine if lender has another outstanding loan to the borrower or any other potential conflict of interest with respect to the borrower.

d. When does a Litigation Plan require prior approval by SBA counsel?

SBA participating lenders must submit a Litigation Plan for prior approval to SBA counsel for: (1) non-routine litigation; and (2) routine litigation for which outside counsel proposes to charge fees and costs exceeding \$5,000.

e. When is an amended Litigation Plan required?

Lender must submit an amended Litigation Plan as soon as modifications in the plan are necessary or when the proposed legal costs exceed projections by 5 percent.

f. What if an SBA participating lender fails to submit for prior approval a litigation plan for non-routine litigation or for routine litigation for which outside counsel proposes to charge fees and costs exceeding \$5,000?

Legal fees and costs will only be reimbursed in accordance with the Guaranty Agreement to the extent that SBA counsel determines such fees and costs are necessary, reasonable, and customary in the locality in question. Legal fees and costs will be reviewed by SBA counsel in consultation with SBA supervisory loan servicing/liquidation officials.

44. Which Attorneys May SBA Participating Lenders Use to Litigate?

Lenders may use in-house counsel or retain outside counsel. Fees will not be reimbursed for legal work done by in-house counsel.

45. What is SBA Counsel's Role in Lender Serviced Litigation?

- a. SBA counsel will monitor lender serviced litigation to ensure fees charged by Lender's counsel are necessary, reasonable, and customary in the locality in question. Legal bills incurred by lender during the course of litigation will be submitted to SBA counsel when received, regardless of whether a Litigation Plan is submitted.
- b. SBA counsel will review litigation actions every 60 days to ensure that they are

conducted in a timely and efficient manner.

- c. SBA counsel in consultation with the Associate General Counsel for Litigation may take over the litigation of a case when:
- (1) SBA's interests appear to conflict with the lender's interests;
 - (2) The litigation involves governmental program and/or policy issues;
 - (3) The case potentially is of great precedential value; or
 - (4) The case involves use of special remedies available only to the government.

46. Can an SBA Participating Lender Submit a Litigation Plan as Part of a Liquidation Plan?

Yes, as long as it contains all of the information required by paragraph 47 below.

47. What Must be Included in a Litigation Plan?

- a. Lender's counsel will complete and submit a Litigation Plan setting forth the scope of legal work to be performed and the cost of each action under the plan.
- b. The **Litigation Plan** must include a discussion of the following:
 - (1) Strategy, including what expert witnesses will be needed and their estimated cost and whether the case can be disposed of by motion or by trial;
 - (2) Information regarding all non-SBA debts owed by the borrower, its owners and guarantors to the SBA participating lender, including the original amount of the obligation, current balance and current status;
 - (3) Estimate of the recovery;
 - (4) Risk of adverse precedent;
 - (5) Actual or potential conflicts of interest;
 - (6) Whether some form of Alternative Dispute Resolution (ADR) is advantageous, such as mediation, mini-trial or arbitration;
 - (7) Settlement alternatives;
 - (8) Estimated timetable; and

- (9) Any proposed pro-rata allocation of fees and recoveries, if lender has one or more loans to the borrower, its owner or guarantors that are not guaranteed by SBA.
- c. **Budget** -The budget should contain a fair estimate of the total cost of the litigation and the method of billing, i.e. hourly rate, flat fee or contingency fee. The budget should include associate and paralegal time as well as secretarial overtime (if it will be billed). Costs should also be itemized including but not limited to court costs, service of process, lien searches, photocopying and deposition transcripts. Fee arrangements such as fixed fees, task-based fees, or blended rates in appropriate cases can reduce costs and may be used in cases such as eviction proceedings, motions for relief from bankruptcy stays, and foreclosures. Large volume lenders should be encouraged to seek volume discounts if they have the economic leverage to bargain for reduced rates based on the quantity of legal work generated.
- d. Contingent fee arrangements should be used only when they are cost effective and do not allow the attorney to recoup a large fee for little work, such as a percentage of a large routine foreclosure recovery.

48. What are the Requirements with Respect to the Retention of Attorneys by SBA Participating Lenders?

SBA requires the following:

- a. Consistent with SBA guidelines for participating loans, legal fees must be necessary, reasonable, and customary in the locality in question;
- b. SBA may object to the retention of private counsel that is too costly;
- c. Legal fees charged the lender in connection with SBA litigation cannot exceed those charged the lender for similar work performed in non-SBA litigation;
- d. Lender's in-house legal departments may not bill for legal work performed on SBA loans;
- e. Lender's outside counsel may not bill SBA for work that only benefits the lender; and
- f. SBA counsel must review the actual legal bills when received by the lender in all cases.

49. Will SBA Allow Participating Lenders to Handle All Cases?

No. Some cases are more appropriately handled by SBA because:

- a. The lender has an actual or potential conflict of interest;
- b. The cost of lender's counsel is not cost effective in terms of potential recovery;
- c. The risk of adverse precedent to the Agency warrants that SBA counsel handle the case;
- d. The litigation presents important policy or legal issues;
- e. The special remedies available to the government would produce a greater recovery, such as the prejudgment remedies of the Debt Collection Procedures Act of 1990, 31 U.S.C. § 30001 *et seq.*

50. What Happens After SBA Approves the Litigation Plan?

- a. SBA counsel must:
 - (1) Notify the participating lender in writing of approval or SBA's concerns as to the Litigation Plan within 15 business days;
 - (2) Monitor the course of the litigation, including review of substantive pleadings such as dispositive motions or other pleadings containing substantive legal arguments or statements of policy, and all legal bills. SBA counsel should also approve any subsequent amendments to the Litigation Plan;
 - (3) Provide the status of all litigation cases to the SBA loan servicing/liquidation supervisor every 60 days or earlier at the time of important actions;
 - (4) Input Litigation Plan approval and significant action information into the LLTS; and
 - (5) Ensure that all legal fees and litigation cost information is entered into the Guarantee Loan Purchase System (GLPS) or Care and Collateral Preservation (CPC) System at the earliest possible time.
- b. Lender must:
 - (1) Submit legal bills to SBA counsel when received;

- (2) Submit substantive pleadings such as dispositive motions or other pleadings containing substantive legal arguments or statements of policy prior to filing; and
- (3) Submit an amended Litigation Plan as soon as modification of the plan is necessary or when the proposed legal fees and costs exceed the projections contained in the original litigation plan by 5 percent.

51. When is the Lender Required to Notify SBA Counsel of Litigation?

Lender must notify SBA counsel, in writing, within 15 days of the date of the commencement of any defensive litigation involving an SBA guaranteed loan. The lender should provide SBA counsel with a Litigation Plan at the time of notification of the litigation.

52. What Legal Fees Will SBA Not Reimburse to the Lender?

SBA will not reimburse a lender for:

- a. Any legal fees and costs incurred by lender in an action brought by lender against SBA or in defense of an action brought against lender by SBA;
- b. Any legal fees and costs incurred by lender in joining SBA in the litigation by way of crossclaim or counterclaim;
- c. Any legal fees and costs incurred by lender's outside counsel for performing non-legal liquidation services;
- d. Actions which solely benefit lender as determined by SBA counsel;
- e. Defense of lender liability cases except where the lender's actions were expressly approved by SBA; or
- f. Attorney fees and costs not proposed in a Litigation Plan, unless determined by SBA counsel to be necessary, reasonable, and customary in the locality in question.

53. When Should a Loan be Removed from Litigation?

SBA counsel may remove a loan from litigation when authorized by a 327 action, at the time litigation is complete, or no further recovery action is feasible. Prior to removing a case from litigation, SBA counsel should ensure that all necessary data has been put in the LLTS and that all legal fees and costs of litigation have been placed in the CPC system.

CHAPTER 7 COSPONSORSHIP AND GIFTS

1. What are Counsel's Responsibilities for Cosponsorship?

- a. You are responsible for the legal review of the cosponsorship relationship and intended cosponsored activities to ensure that all legal requirements are met. You should consult SOP 90 75 and 15 U.S.C. §637(b) of the Small Business Act. Consistent with your role as senior legal advisor to the district director, you must sign Part II of SBA Form 1615, "Cosponsorship Approval Form," indicating your opinion as to whether the cosponsorship is legally sufficient.
- b. To reach the legal conclusion above, you must review at least the following documents where the cosponsorship is with a for-profit entity.
 - (1) The SBA Form 1741, "Cosponsorship Agreement," completed except for execution. The review should include:
 - (a) Whether the activity or event in fact is a cosponsorship as SBA defines that term;
 - (b) Whether the proposed approving official is authorized to approve the particular cosponsorship;
 - (c) Whether the statutory requirements governing cosponsorships will be satisfied (15 U.S.C. §637(b)(1));
 - (d) Whether any supplemental terms are consistent with the terms of SBA Form 1741, and if not, or if any of the terms of the form have been amended, whether such terms or amending provisions have been approved by the Associate Administrator for Business Initiatives and the General Counsel; and
 - (e) Whether all cosponsors will sign the Cosponsorship Agreement or SBA Form 1986 agreeing to be bound by the terms of SBA Form 1741.
 - (2) The budget submitted for the cosponsorship. The review should include:
 - (a) Whether the sources of financing are permissible;
 - (b) Confirmation that SBA will not be obligated to cover any shortfalls;

- (c) Confirmation that the fees charged will not exceed a minimal amount needed to cover the direct costs; and
 - (d) Confirmation that an SBA employee will not handle the funds.
- (3) The SBA Form 1615, (Cosponsorship Approval Form). Part I of this form must be completed and signed prior to your review.
- c. Where the cosponsorship is not with a for-profit entity, you must review the written summary of the understanding of the parties prepared by the program official. The program official may or may not use the SBA Form 1741 to create the required summary. Your review should include the items identified in section b.(1)(a)-(c), b.(2) (although an actual budget need not be submitted), and b. (3).
- d. To reach the legal conclusion in section 1. a. of this paragraph, you must consider:
 - (1) The nature of each cosponsor; and
 - (2) Conduct a conflict of interest analysis where required (see paragraph 2-7 of SOP 90 75).
- e. The following factors may be used as a guide in determining whether an entity having a business relationship with SBA can qualify as a cosponsor:
 - (1) Does the relationship create an actual or apparent conflict of interest?
 - (2) You must also consider the size of the entity; the nature and extent of SBA's business relationship with the entity (including any relevant contracting history); whether the same SBA program office and unit of the entity are involved in the relationship, the aggregate number and value of gifts made by the entity to SBA, or local offices of SCORE, SBDCs, WBCs, and other resource partners during the preceding 12-month period; and any other relevant factors.
- f. If you determine that there is an actual conflict of interest, you must state that the cosponsorship agreement is not legally sufficient.
- g. Where there is an apparent conflict of interest, you should recommend appropriate measures to eliminate the appearance of a conflict or, if that is not possible, state that the cosponsorship is not legally sufficient.

2. What are Counsel's Responsibilities for Gifts?

- a. SBA has statutory authority to accept gifts for Agency use (15 U.S.C. 637(b)(1)(G)). SBA's policies and procedures implementing this authority are contained in SOP 90 75. You must concur with proposed gifts to SBA both prior to solicitation and prior to acceptance. Your signature on Parts 1 and 2 of SBA Form 1962, "Gift Approval Form," indicates your opinion that the solicitation and acceptance meet applicable requirements.
- b. In reviewing a proposed solicitation of a gift, you should consider the following.
 - (1) Whether the gift is for a permissible purpose.
 - (2) Whether the gift is to be donated by a permissible source. You may need to conduct a conflict of interest analysis regarding the donor using the factors referenced above.
 - (3) Whether the approving official is authorized to approve the particular gift.
 - (4) Whether the donor is a cosponsor (if so, the donation is treated as a contribution to the cosponsorship rather than a gift to SBA).
 - (5) Whether the provisions of SOP 90 75 regarding special guidance on particular types of gifts is applicable.
- c. In reviewing a proposed acceptance of a gift, you should consider:
 - (1) Whether the conditions, if any, imposed by the donor are legally permissible;
 - (2) Whether the named approving official is authorized to accept the particular gift; and
 - (3) Whether Oversight Committee concurrence has been obtained, if necessary.
- d. You should ensure that documents referring to any in-kind gift make it clear that the donor has set the estimated value, not by SBA. Donors can be expected to claim the gift as a tax deduction, and SBA should not become a source of authority for valuation of the gift in the donor's communications with IRS.

CHAPTER 8
GOVERNMENT CONTRACTING AND 8(a) BUSINESS DEVELOPMENT PROGRAM

1. What are Counsel’s Responsibilities Under the 8(a) Business Development Program (8(a) BD)?

When referred to you as counsel, you review applications for 8(a) BD program participation, reconsideration, and recommendations for graduation, termination, and suspension. You review contracts, contract files, joint ventures, management agreements, and teaming agreements. You counsel and advise program officials on legal matters presented to you. For further information, see 13 CFR §124, and SOP 80 05, “Minority Small Business and Capital Ownership Development.”

2. What Must Counsel Review to Determine if an Applicant is Eligible for the 8(a) BD Program?

You review all 8(a) applications submitted to the Legal Division. Your review must address the legal sufficiency of the 8(a) BD recommendation for acceptance or denial of the firm into the 8(a) BD program. You must complete the review within 10 calendar days (see SOP 80 05 2, paragraph 20.d.). At a minimum you must review the following.

- a. The information contained in an electronic application demonstrating:
 - (1) Individual and business program eligibility; and
 - (2) Ownership, management, and control of the applicant concern. The company must be at least 51 percent owned, controlled, and managed by socially and economically disadvantaged individuals (13 CFR §124.103 and 124.104).
- b. In cases of hardcopy applications, all documents supporting the conclusions set forth in sections a. (1) and (2), of this paragraph, including the Articles of Incorporation/Organization, bylaws, stock certificates, stock ledgers, partnership agreements, management agreements, and agreements related to company control (13 CFR Sections 124.103 and 124.104).
- c. The Anchorage District Office reviews applications for completeness from concerns owned by Alaska Native Corporations. Headquarters then reviews such applications.

3. What Must Counsel Review to Determine if a Proposed Change in Ownership is Permitted under the 8(a) BD Program?

- a. You must review all proposed changes in ownership to determine whether the "persons upon whom eligibility is based" continue to own 51 percent of the participant concern, and continue to manage and control the concern. At a minimum, the review must include all documents related to the proposed change in ownership including:
 - (1) All agreements relating to sale;
 - (2) A description of the method of financing the sale; and
 - (3) All documents changing business ownership or structure.
- b. You must also review all name changes of 8(a) firms to ensure that they are:
 - (1) Not also changes in ownership that adversely affect eligibility; and
 - (2) Legally accomplished.

4. What is Counsel's Role Regarding Terminations, Suspensions, and Graduations?

You must review for legal sufficiency:

- a. The reasons cited for termination, suspension, or graduation;
- b. The supporting data for SBA's proposed action; and
- c. The notice of termination, suspension, or graduation.

5. What is Counsel's Role with 8(a) Contracts, Modifications, and Basic Ordering Agreements?

- a. You must review all 8(a) contracts and contract files for legal sufficiency. Reviews of contract modifications, within the scope of the contract, are at the discretion of the contracting officer. Out of scope modifications are reviewed for legal sufficiency as new contracts.
- b. You must review all Basic Ordering Agreements (BOA). Treat the review of each task order as you would the review of a new contract. The company must meet size and eligibility criteria at the time of each task order.

- c. When you review an 8(a) contract, you must use the Legal Review Checklist (see SBA Form 1732, "8(a) Contract Legal Review").
- d. You must verify that the contractor's name on the contract is the correct legal name of the 8(a) participant, and the name under which the firm is admitted to participate in the 8(a) program.
- e. You must review all novations, proposed joint ventures, recommendations for graduation, suspension or termination, and requests for waivers of the performance of work by original 8(a) concern/termination for convenience requirements set forth in 13 CFR §124.317.

6. What are Counsel's Responsibilities in the Certificate of Competency (COC) Program?

A COC is a written document issued by SBA to a Government contracting officer. It certifies that a designated small business has the capability to perform on a specific Government contract. Counsel's role in the COC process is the following:

- a. Review the file supporting the request for a COC for legal sufficiency and issue a signed statement for inclusion in the case file.
- b. Sit as a voting member of the Area Review Committee, which votes on the technical and financial capability of a company to perform a specific contract and makes recommendations to the area director on whether to issue a COC. As a voting member of the committee, you are not limited to commenting on legal issues, and are free to question and opine on the financial and technical capacity of the firm to perform the contract in question.
- c. Conduct legal research and prepare memoranda on significant legal issues that arise in particular COC cases.
- d. On referrals based on a company's potential lack of integrity, review the case file for timeliness of allegations, adequate evidence, and complete documentation, and prepare a written opinion on the legal sufficiency of the evidence to support issuance or denial of the COC on integrity grounds.

CHAPTER 9 SIZE DETERMINATIONS

1. What is a Formal Size Determination?

- a. A formal size determination is made only with respect to eligibility for Government programs or a preference reserved for "small business." SBA will not make a formal size determination simply at the request of a firm. However, SBA will provide guidance to a business on how to certify.
- b. A size "decision" can be an informal threshold decision made by program personnel. However, a formal size determination must be made by the Office of Government Contracting, must be in writing, and has binding effect.
- c. The individual with final financial assistance authority makes informal threshold decisions as to whether the applicant is small for the purposes of financial assistance. (See 13 CFR §121.303(c).) For the purpose of the 8(a) BD program, the Division of Program Certification and Eligibility makes informal threshold decisions. For continued participation in the program, the 8(a) BD division (see 13 CFR §121.602) makes informal reviews.

2. What is Counsel's Role in Determining Whether a Concern is Small?

You provide any requested legal support, including advice, in a decision as to whether a concern is a small business concern. The Office of Government Contracting may also call upon you to assist in a formal size determination. SBA's regulations governing size determinations are at 13 CFR Part 121. For additional information, please refer to SOP 90 01, "Size Determination."

3. What Factors Do You Consider in a Size Decision or Determination?

Consider the following factors in determining whether a concern is a small business concern:

- a. The concern's applicable Standard Industrial Classification (SIC) Code and the accompanying maximum number of employees or maximum allowable annual receipts;
- b. The type of Government assistance or preference sought by the concern; and/or
- c. The concern's affiliates, if any, and either the number of employees or the annual receipts of its affiliates.

4. What is a Standard Industrial Classification (SIC) Code and How Does It Impact Size

Determinations?

- a. SIC codes are numerical designations which distinguish business activities within the U.S. economy. Four-digit numbers designate an industry, which is a group of providers of related goods or services. Each provider is classified into the four-digit industry that best describes its most significant activity. This is called its primary SIC code. Three-digit, two-digit, and one-digit codes are aggregations of industries that represent industry groups, major groups, and industry divisions, respectively. The types of economic activities or industries include:

Division	C - Construction
	D - Manufacturing
	E - Transportation and Public Utilities
	F - Wholesale Trade
	G - Retail Trade
	H - Finance, Insurance and Real Estate
	I - Services

- b. SBA's size standards establish the maximum size that a business (including its affiliates) may be while still qualifying as "small" within a particular SIC Code. Unless otherwise specified, a size standard is either a number referring to employees or a dollar amount, such as 500 employees or \$5 million (13 CFR §121.201 et seq.).
- (1) For example, the size status of wholesalers and manufacturing companies is based upon the number of employees they have.
- (2) Generally, the size status of construction companies and the service industry companies depends on the average dollar value of their past 3 years' annual receipts.

5. Does the Type of Government Assistance or Preference Sought Impact on a Concern's Small Business Status?

Yes. The regulations separately list eligibility requirements (to be considered "small") for different types of Government programs:

- a. For SBA financial assistance (13 CFR §121.301 et seq.);
- b. For the 8(a) BD program (13 CFR §121.601 and ff.);
- c. For Government procurement (13 CFR §121.401 and ff.);
- d. For sales or lease of Government property (13 CFR §121.501 and ff.); and

- e. For the Small Business Innovation Research Program (13 CFR §121.701 and ff.).

6. What is an Affiliate?

Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties control(s) or has power to control both (13 CFR §121.103).

- a. Control can exist through the following:
 - (1) Common ownership;
 - (2) Common management;
 - (3) Contractual relationships or economic dependency;
 - (4) Family relationships;
 - (5) Prior business relationships; and/or
 - (6) Stock ownership.
- b. Some examples of affiliation through control are:
 - (1) Third parties or a third party own(s) and control(s) or have (has) the power to own and control two firms;
 - (2) One or more officers, directors, or general partners of one firm control(s) the board of directors and/or the management of another concern (13 CFR §121.103 (e));
 - (3) One concern is dependent upon another for contracts and business to such a degree that its economic viability would be in jeopardy without such contracts/business; and/or
 - (4) A person has control of a concern when he or she has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock (13 CFR §121.103 (c)).
- c. For purposes of determining affiliation, stock options, convertible debentures, and agreements to merge (including agreements in principal) are considered exercised (13 CFR §121.103 (d)).

7. Who May Request A Formal Size Determination?

The following persons may request a formal size determination.

- a. For SBA financial assistance:
 - (1) The applicant; or
 - (2) The SBA official with authority to take final action on the assistance requested.
- b. For eligibility for SBA's 8(a) BD program:
 - (1) The applicant; or
 - (2) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for 8(a) BD.
- c. For 8(a) subcontracts:
 - (1) The 8(a) BD concern nominated for the job;
 - (2) The apparent successful offeror for the 8(a) award;
 - (3) The SBA district director in the district servicing the area in which the headquarters of the above mentioned 8(a) BD concern is located;
 - (4) The Associate Administrator for 8(a) BD; or
 - (5) The SBA program official with authority to execute the 8(a) contract.
- d. For the COC Program:
 - (1) The offeror who has applied for the COC;
 - (2) The responsible SBA Government contracting area director; or
 - (3) The Associate Administrator for Government Contracting.

- e. For the 8(d) Subcontracting Program:
 - (1) The prime contractor;
 - (2) The contracting officer;
 - (3) Other potential subcontractors;
 - (4) The responsible SBA Government contracting area director or the Associate Administrator for Government Contracting; and
 - (5) Other interested parties.

8. What Time Limits Apply to Size Determinations?

The time limits vary as follow.

- a. For financial assistance, there are no time limitations for making a formal size determination (13 CFR §121.303(e)). A formal size determination may be requested prior to a denial of eligibility based on size or after assistance has been denied for size (13 CFR §121.303(c) and (d)).
- b. In other program areas, SBA generally will make a final size determination within 10 working days of receipt of a protest or request.
- c. For Government procurement, the time limit for making a size protest is 5 days, exclusive of Saturdays, Sundays, and legal holidays (See 13 CFR §121.1004):
 - (1) After bid or proposal opening;
 - (2) After the contracting officer has notified the protestor of the identity of the prospective awardee; or
 - (3) For Multiple Award Schedule Set Aside Contracts, a protest must be made prior to the expiration of the contract period (including renewals).
- d. Contracting officers or SBA may file size protests before or after award, except for protests (made by contracting officers) filed prior to bid opening or notification to offerors of the selection of the apparent successful offer will be dismissed as premature (13 CFR §121.1004(b) and (e)).

9. Who Makes a Formal Size Determination?

The responsible Government contracting area director or designee makes all formal size determinations, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the disaster area office director or designee responsible for the area in which the disaster occurred (13 CFR §121.1002).

10. What May a Firm Do to Challenge a Size Determination Believed to be Incorrect?

A firm (or other interested parties) may petition the Office of Hearings and Appeals for review of a formal size determination. There is no automatic right of appeal. The formal size determination is the final Agency decision unless the Office of Hearings and Appeals grants the petition and reverses the size determination (13 CFR §121.1101 and 13 CFR §134).

11. When May a Firm Again Self-Certify that it is Small After an Adverse Size Determination?

A firm may request SBA to re-certify it as small at any time by filing an application for re-certification with the Government contracting area office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. It must also include any pertinent information that shows it has overcome the elements which resulted in its finding of other than small.

CHAPTER 10
AGENCY RELEASES OF INFORMATION

1. What is a Freedom of Information Act (FOIA) Request?

SBA considers any written request by a person for copies of Federal agency records to be a FOIA request. The request must reasonably describe the specific records requested.

2. What is the Agency's Policy on Disclosure?

- a. The public has the right to Agency records, except to the extent that the records (or portions thereof) are protected from disclosure by one of the specific exemptions and the law enforcement exclusions.
- b. Additionally, there is a governmentwide directive that urges the disclosure of records where the Agency has discretion to do so unless disclosure would cause demonstrable harm to the Agency's interests. In some cases, particularly with respect to inter-agency or intra-agency memorandums or letters, this policy would cause disclosure even though a court would uphold non-disclosure. You should consult with the FOIA office when you wish to withhold documents in this category.

c. **For further information, see:**

5 U.S.C. §552

13 CFR Part 102

SOP 40 03

Executive Order 12600, 52 F.R. 23781 (June 25, 1987)

Department of Justice, FOIA Guide and Privacy Act Overview

Department of Justice FOIA Updates

FOIA Homepage: <http://www.sba.gov/foia>

COC Program: SOP 60 04

3. What is Counsel's Responsibility for a FOIA Request?

- a. You must:
 - (1) Review the FOIA request and the proposed Agency response with attachments;
 - (2) Decide what information can be legally disclosed, what must be withheld, and the reasons for each Agency action; and

- (3) Review the detailed index of those records proposed to be withheld, including the identity of each record and the FOIA exemptions cited for withholding the same. This index is similar to a "Vaughn Index."
- b. District directors often designate district counsel as FOIA contacts for district offices. SOP 40 03 describes the Agency's responsibilities under the FOIA.

4. How Much Time Does SBA Have to Respond to a FOIA Request?

- a. SBA has 20 working days to respond to a FOIA request, which asks for documents kept by that office, unless there are unusual circumstances (see paragraph 10-5, below).
- b. If a request is for records not held by that office, the request must be sent to the correct office and responded to within 20 working days. A letter must be sent to the requester, acknowledging receipt of the request and notifying the requester where the request has been forwarded (13 CFR §102.3 (c)).
- c. The FOIA allows requesters to seek expedited processing if one of the following conditions is met:
 - (1) The requester demonstrates that someone's life or physical safety would be in imminent danger if we did not respond to the request within 20 working days; or
 - (2) The requester represents a news medium and shows an urgent need to inform the public about an actual or alleged Federal activity.

If a requester provides certification of compelling need, you must decide whether to grant the expedited processing within 10 days of the date of the request and notify the requester of your decision. You must give priority to an expedited request and process the requested records as soon as possible/practicable.

If expedited processing is denied, the Freedom of Information/Privacy Act Office (FOI/PA Office) will give expeditious consideration to any administrative appeal of a denial. (See paragraph 10-15 below for appeal procedures.)

- d. Multi-track processing is permitted if an office receives so many requests that it cannot respond to all within 30 working days. Requests on each track would then be processed generally in the order in which they are received.
 - (1) Fast Track: if the information is clearly identified and has been previously released or placed in a Reading Room, the request could be processed within 10 working days after it arrives in the correct office.

- (2) Regular Track: if the information is clearly identified, is less than 51 pages, and requires less than 2 hours to review and process, the request could be processed within 20 working days after it arrives in the correct office.
- (3) Slow Track: if the information is not clearly identified, is more than 50 pages, requires more than 2 hours to review and process, is maintained in more than one SBA office, or includes information belonging to another agency or private concern whose consent must be obtained before release, the request could be processed within 30 working days after it arrives in the correct office.

Requesters should be given the opportunity to limit their requests in order to obtain faster processing.

5. What are Unusual Circumstances That Justify an Agency Response After 20 Working Days?

- a. The following is a list of unusual circumstances that justify an extended response period (up to 10 working days):
 - (1) The requester seeks an especially large number of records;
 - (2) The records are not located in the office handling the request; and
 - (3) SBA needs to consult with another Government office.
- b. SBA must notify the requester in writing if extra time is required.

6. Must a Freedom of Information Request Follow a Prescribed Form?

- a. A request must be in writing, sent to the SBA office where the records are kept or to the nearest SBA field office or to the Chief, FOI/PA Office in Headquarters. The request must reasonably describe the requested records (13 CFR §102.2(b)).
- b. SBA also accepts requests submitted by fax or the online FOIA request form. The online FOIA request form can be found at <http://www.sba.gov/foia>.
- c. You may refer requesters to the FOIA homepage at <http://www.sba.gov/foia> for general information or the SBA online library at <http://www.sba.gov/library> for specific information (e.g., approved loan information, a list of 8(a) contractors). Also, SBA policy statements and standard operating procedures are available to the public in the SBA Reading Room. (13 CFR §102.2(a)).

7. Who can Make a Freedom of Information Act Request?

- a. Any "person," including corporations and State governments, can make FOIA requests. The FOIA excludes:
 - (1) Other Federal agencies; and
 - (2) Fugitives from justice, or their agents.
- b. A requester representing another person, must provide written documentation authorizing him or her to act on behalf of the other person. If the request omits the signed authorization, SBA must inform the requester that it is needed (13 CFR §102.3(b)).

8. What is an Agency Record?

An Agency record includes any information maintained by the Agency in any format, including electronic.

9. How Should the Agency Handle its Response?

- a. The office or division having custody of the requested records compiles the draft Agency response.
- b. You must send a copy of the request to the FOI/PA Office within 48 hours of receipt. Additionally, you must send a copy of the initial response to the FOI/PA Office. Do not send supporting documents unless requested to do so. If the FOI/PA Office requests documents, send copies. Do not send the original documents to the FOI/PA Office.
- c. Before you actually process a request, you must determine all applicable fees and process initial fee waiver requests. See SOP 40 03 for specific guidance on applicable fees and processing an initial fee waiver request.
- d. SBA counsel should review the response in the manner described in paragraph 10-3 above.
- e. Requests for documents generated by the IRS or other agencies are common, and SBA may have copies of such documents in its files. SBA must send the request for such records to the Government agency that created the record.

10. What Exemptions and Restrictions Frequently Prevent SBA from Disclosing Agency Records?

This paragraph briefly describes the most frequently cited FOIA exemptions. There are other exemptions that may apply. For a complete listing and discussion of all of the FOIA exemptions see SOP 40 03.

- a. Exemption 2 protects records "related solely to the internal personnel rules and practices of the agency."
- b. Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (13 CFR §102.6).
- c. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption protects documents normally privileged in the civil discovery context. Two rules apply to Exemption 5. First, the exemption applies only to predecisional documents such as advice, recommendations, proposals, etc.; it does not apply to purely factual matters. Second, the exemption does not apply to deliberative documents or portions of documents that are expressly adopted as the basis of a final agency action. You should disclose information if no foreseeable harm to agency deliberation would result.
- d. Exemption 6 protects personnel, medical, and similar files that invade another person's privacy. Businesses and corporations do not have protected privacy interests, but their individual officers and employees may.
- e. Exemption 7 protects investigatory records compiled for law enforcement purposes, if the release of such records would cause one or more of six specified types of harm.
- f. Privacy Act records are generally withheld under Exemption 6 or 7(c) (Investigative Records).
- g. The identity of Offerors under Negotiated Procurement Contracts and their proposals are protected from disclosure. (See 10 U.S.C. §2305(g) and 41 U.S.C. §253b(m)).

11. Must SBA Give Notice to Submitter of Intent to Disclose Confidential Business Information?

- a. When SBA intends to disclose confidential commercial and/or financial business information submitted prior to March 1, 1996, SBA must:

- (1) Notify the requester that the submitter of the business information must be notified prior to disclosure of any information;
 - (2) Notify the submitter of the business information of the request and that they have 5 working days to respond to SBA's notice; and
 - (3) Inform the submitter that its response must explain why the identified information would cause substantial competitive harm, if disclosed.
- b. For business information submitted after March 1, 1996, that has not previously been released to the general public, SBA must:
- (1) Notify the submitter of business information (which the submitter has identified as confidential and likely to cause substantial competitive harm) that SBA intends to release said information, upon receipt of the request; and
 - (2) Notify the submitter of business information that SBA believes to be confidential and may cause substantial competitive harm, and which has been requested under FOIA.

12. What Information Must the Agency Provide to the Submitter?

- a. If SBA decides to disclose:
- (1) SBA must give the submitter the 5 days notice before disclosure without violating the FOIA time constraints; and
 - (2) SBA must tell the submitter that SBA intends to disclose and when it intends to make disclosure.
- b. If SBA decides to withhold all or part of the information requested, SBA will promptly notify the submitter of any suit filed against SBA to compel disclosure.

13. What Must the Agency's FOIA Response Include Where All Requested Information is Disclosed in Full?

The Agency response must include:

- a. All the requested information which is determined to be non-exempt (after notice to the submitter, if applicable); and
- b. A statement requesting payment of the fee agreed to.

14. What Must the Agency's FOIA Response Include Where Information is Being Withheld?

- a. If SBA decides to withhold all or part of the requested information, the Agency response must include:
- (1) All the requested information which is determined to be non-exempt (after notice to the submitter, if applicable);
 - (2) A detailed index of records withheld in full or in part, including the identity of each record, the FOIA exemption(s) cited for withholding disclosure, and the number of pages withheld (this index is similar to a "Vaughn Index");
 - (3) Where part of a record is withheld, markings that indicate where information is withheld and the applicable exemption(s), wherever technically feasible to do so;
 - (4) A statement of appeal rights of the nondisclosure decision and fees charged (paragraph 10-15 (a) and (b), below); and
 - (5) A statement of the fee charged if any (fees should be estimated and a fee declaration received before processing).
- b. You must search and review all pertinent information before withholding all records (i.e., before issuing a "blanket denial").

15. What are the Requester's Appeal Rights Under the FOIA?

The appeal rights of a requester are stated in 13 CFR §102.9. They are as follows:

- a. Appeal of a Non-Disclosure Decision or No Records Decision.
- (1) File written appeal within 45 calendar days of the date of the SBA determination;
 - (2) Send it to the Chief, FOI/PA Office at 409 Third Street SW, Suite 5900, Washington, DC 20416;
 - (3) Specify the records that were denied;
 - (4) Give the name, title, and office address of the person who denied the request; and
 - (5) Give any other information the requester deems appropriate.
- b. Appeal of an SBA Initial Fee Decision.

- (1) File written appeal according to sections a.(1) and (2) of this paragraph;
 - (2) Give the address of the office that made the initial fee decision;
 - (3) State the fee that the office charged;
 - (4) State the fee, if any, the requester believes should have been charged;
 - (5) Give the reason(s) for the claimed lower fee; and
 - (6) Include any information the requester deems appropriate.
- c. Appeal of a Denial of Expedited Processing.
- (1) File written appeal with the Chief, FOI/PA Office at 409 Third Street SW, Suite 5900, Washington, DC 20416;
 - (2) Include a description of the records requested;
 - (3) Specify the reason(s) why SBA should respond to the request in an expedited manner;
 - (4) Include the name, title, and office address of the person who denied the request for expedited processing; and
 - (5) Include any other information the requester deems appropriate.
- d. Unless there are unusual circumstances, SBA will decide an appeal within 20 working days from receipt. In unusual circumstances, an additional 10 days can be warranted.

16. Does SBA Charge Fees for Responding to a FOIA Request?

SBA charges fees for search time, reproduction costs, and in some cases for time spent reviewing documents for release. The amount of the fees depends on the type of service given by SBA, and the type of FOIA requester. Therefore, you and other SBA personnel must estimate the time likely to be spent on a request and keep track of the time actually spent on responding to the request. See 13 CFR §102.8 and SOP 40 03 for detailed information as to when and for what services SBA charges in a specific situation.

17. What Fee Language is Required With the Agency Response?

SBA must inform the requester of the following:

- a. The fee charged;
- b. That if payment is not received within 31 days, interest will be charged at the maximum rate allowed under Title 31 of the United States Code, section 3717 (13 CFR §102.8(k));
- c. That if payment is not received within 90 calendar days of due date, SBA may notify consumer credit reporting agencies of your delinquency; and
- d. SBA must notify the requester of his or her appeal rights (paragraph 10-17, above).

18. What is the Privacy Act (PA)?

- a. The PA permits an individual to seek access to their own records and protects an individual from the disclosure of protected information to third parties. PA records are maintained in an agency system of records retrieved by the requesting individual's own name or personal identifier, such as a social security number.
- b. Since the FOIA provides that an agency need not disclose any information that would result in an invasion of privacy, there should be no conflict between the acts.
- c. **For more information see:**

5 U.S.C. §552a
 13 CFR Part 102
 SOP 40 04
 OMB Guidance 12600, 52 F.R. 23781 (June 25, 1987)
 Department of Justice, FOIA Guide and PA Overview
 Department of Justice FOIA/PA Updates
 FOIA Homepage: <http://www.sba.gov/foia>

19. Who is Responsible for Implementing the PA?

- a. The PA officer is responsible for overseeing the act.
- b. The systems manager is the Agency employee in each field or program office responsible for implementing or overseeing the Act within his or her office.

20. What is Counsel's Role Regarding the PA?

Upon request, you recommend and advise program personnel of the legal implications regarding the collection, maintenance and disclosure of personal information. You should advise them that individual liability may result if information protected under the PA is released.

21. What is Counsel's Responsibility when SBA or an Employee Receives a Subpoena for Agency Records or for Testimony on an Agency Related Matter?

- a. Civil subpoenas: See paragraph 6-40a.
- b. Criminal subpoenas: See paragraph 6-40b.
- c. If an employee is testifying, counsel will accompany the employee and object if a questioner asks for testimony outside of the scope of the Agency's authorization to comply.
- d. If SBA decides not to comply with the subpoena, counsel will appear or otherwise communicate the Agency's decision, and will explain such noncompliance by asserting an appropriate legal basis such as privilege or statute (13 CFR §102.12(c)).

e. **For more information see:**

Chapter 6, paragraph 41 above
13 CFR §102.12
SOP 40 03

CHAPTER 11

EMPLOYEE STANDARDS OF CONDUCT

1. What is Meant by "Standards of Conduct?"

All employees, and certain former employees, are responsible for being familiar with and adhering to standards of ethical conduct and other responsibilities established by the Agency, the Office of Government Ethics and by Federal law. These standards and responsibilities are established by means of statute (including criminal statutes such as Title 18 of the United States Code), regulation, executive order, and Agency policy (standard operating procedures, instructions, and directives).

2. What are the Regulations and Policies that Relate to Employee Standards of Conduct?

Titles 5 and 13 of the Code of Federal Regulations (CFR), as well as this SOP should be consulted. The regulations that an employee should be familiar with and adhere to are as follows:

- a. 13 CFR, Part 105, "Standards of Conduct and Employee Restrictions and Responsibilities;"
- b. 5 CFR, Part 734, "Political Activities of Federal Employees;"
- c. 5 CFR, Part 735, "Employee Responsibilities and Conduct;"
- d. 5 CFR, Chapter XVI, "Office of Government Ethics," Subchapter B, "Government Ethics," Parts 2634, 2635, 2636, 2637, 2640 and 2641; and
- e. 5 CFR, Chapter XLIV, "Supplemental Standards of Ethical Conduct for Employees of SBA," Part 5401 (when published).

3. What Other Standards of Conduct Apply to Employees?

- a. All employees are responsible for:
 - (1) Adhering to all Agency rules, regulations, operating procedures, instructions, and other proper directives in the performance of their official duties;
 - (2) Securing advice from the appropriate Standards of Conduct Counselor when in doubt about the meaning or application of any conduct or ethics requirement;

- (3) Obtaining advance written approval, when required, before engaging in any outside employment or activity;
 - (4) Adhering to applicable requirements governing the submission of Financial Disclosure Reports;
 - (5) Subordinating their personal opinions to established Government policy and Agency procedures in the performance of their official duties;
 - (6) Clearing all statements to the media, which relate to official Government business, with appropriate Agency management (as established by Agency policy); and
 - (7) Performing their official duties in a professional manner while observing the full requirements of courtesy, consideration, and promptness.
- b. No employee shall engage in any action, whether or not otherwise specifically prohibited, which might result in:
- (1) Using, or creating the appearance of using, their public office or position to obtain or coerce private gain or advantage, financial or otherwise, for themselves or on behalf of any other person;
 - (2) Impeding Government efficiency or economy; or
 - (3) Recommending the use of any non-governmental person or entity as an agent, attorney or service provider in connection with official Government business, unless otherwise authorized to do so.

4. Who Has the Responsibility to Provide General Advice, Assistance, Guidance, and Training Concerning Standards of Conduct?

The Designated Agency Ethics Official/Agency Standards of Conduct Counselor (DAEO/SCC), the Chief Assistant Standards of Conduct Counselor (CASCC), and other assistant standards of conduct counselors designated by the DAEO/SCC, are responsible for providing advice, assistance, guidance, and training to employees concerning standards of conduct. (See 13 CFR §105.402.)

5. Who is the Agency's DAEO/SCC and Alternate DAEO/SCC?

The Administrator has appointed David R. Kohler, Associate General Counsel for General Law, as the DAEO, pursuant to the Ethics in Government Act of 1978. In this position Mr. Kohler also serves as the Agency's SCC. The Administrator has also appointed Mark K. Stephens, Deputy General Counsel, as the Alternate DAEO. In the absence of Mr. Kohler, he serves as the DAEO/SCC with all authorities and responsibilities of the DAEO/SCC.

6. Who is the Agency's CASCC?

Mr. Kohler, the DAEO/SCC has designated Robinson S. Nunn, Chief Counsel for Ethics, as the Agency's CASCC.

7. Has the DAEO/SCC Designated Additional Assistant Standards of Conduct Counselors?

Yes. Five Regional Assistant Standards of Conduct Counselors (RASCC) have been designated, and all district counsel have been designated as District Assistant Standards of Conduct Counselors (DASCC). Each RASCC is responsible for two regions, grouped as follows: regions 1 & 2, regions 3 & 4, regions 5 & 6, regions 7 & 8, and regions 9 & 10. In addition, the Assistant Inspector General for Management and Legal Counsel has been designated as the Inspector General's Assistant Standards of Conduct Counselor (IGASCC), and the four disaster area counsel have been designated as Disaster Area Assistant Standards of Conduct Counselors (DAASCC). Other assistant standards of conduct counselors may be designated by the DAEO/SCC as needed.

8. What are the Duties of the Standards of Conduct Counselors?

The DAEO/SCC and the other Assistant Standards of Conduct Counselors:

- a. Provide advice, assistance, guidance, and yearly training to employees concerning standards of ethical conduct and other employee responsibilities. Training materials may be obtained from the CASCC or from the Office of Government Ethics located at 1201 New York Avenue, Suite 500, Washington, DC 20005-3917, <http://www.access.gpo.gov/usoge>;
- b. Monitor the Standards of Conduct Program and provide required reports on it;
- c. Ensure compliance with 5 CFR Part 2634, subpart I, relating to public and confidential financial disclosure reports, and provide annual reports of compliance;
- d. Provide outside employment decisions pursuant to 5 CFR §5401.104; and

- e. Make appropriate referrals to the Agency's Standards of Conduct Committee pursuant to 13 CFR Part 105.

9. What Personnel Does the CASCC Directly Serve?

The CASCC directly serves personnel in the Agency's Headquarters, and in other offices designated by the DAEO/SCC. The CASCC is also responsible for the distribution, collection, review and retention of financial disclosure statements for personnel in Headquarters (and other designated offices), for all PAS, SES, Senior Government, and Schedule C employees, for all RASCCs, the IGASCC, all DAASCCs and disaster area directors, and all other assistant standards of conduct counselors and their supervisors, if any.

10. What Personnel Do the RASCCs Directly Serve?

The RASCCs directly serve the personnel in the regional offices in their regions, and in other offices designated by the DAEO/SCC. The RASCCs are also responsible for provision of advice to the DASCCs in their regions, upon request, and the distribution, collection, review and retention of financial disclosure statements for all regional office employees (and other designated offices), and the DASCCs and district directors in their regions (excluding SES, Senior Government, and Schedule C employees).

11. What Personnel Do the DASCCs Directly Serve?

The DASCCs directly serve the personnel in their district office, and in any branch office under its jurisdiction. The DASCCs are also responsible for the distribution, collection, review and retention of financial disclosure statements for all district and branch office employees in their districts (excluding district directors, and SES, senior Government, and Schedule C employees).

12. What Personnel Does the IGASCC Directly Serve?

The IGASCC directly serves all Office of Inspector General personnel and is responsible for the distribution, collection, review and retention of confidential financial disclosure statements for IG employees nationwide (excluding SES, Executive Level, and Schedule C employees).

13. What Personnel Do the DAASCCs Directly Serve?

The DAASCCs directly serve all personnel in their disaster area office and all field disaster personnel under the area office's jurisdiction. The DAASCCs are also responsible for the distribution, collection, review and retention of confidential financial disclosure statements for disaster employees under their area's jurisdiction (excluding

area directors, and SES, Executive Level, and Schedule C employees).

14. What is the Standards of Conduct Committee?

The Standards of Conduct Committee, whose membership is established by 13 CFR §105.401, provides advice and gives direction and approval (when required) to SBA management officials concerning the administration of statutes, regulations and policies dealing with conflicts of interest and ethical standards of conduct.

15. What Matters Must be Approved in Advance by the Standards of Conduct Committee?

Assistance to SBA employees or members of their households (see 13 CFR §105.204), to officers or employees of other Government organizations (see 13 CFR §105.301), and to employees or members of quasi-Government organizations (see 13 CFR §105.302), other than disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, must be approved in advance by the Agency's Standards of Conduct Committee.

16. What Matters Must be Approved in Advance by the Standards of Conduct Counselor?

Before providing SBA assistance to a person employing an individual who, within 1 year prior to the request for such SBA assistance, was an SBA employee, the prior approval of the DAEO/SCC must be obtained. The DAEO/SCC will refer matters of a controversial nature to the Standards of Conduct Committee for final decision; otherwise, his or her decision is final. (See 13 CFR §105.203.)

CHAPTER 12
PERSONNEL AND RELATED MATTERS

1. What is Counsel's Responsibility in the Area of Personnel, EEO, and Related Matters?

As district counsel, you should be able to recognize and proactively refer situations requiring legal or Human Resources (HR) advice. Counsel need not know all the answers, but must know when to call for help and where to get it. This responsibility may be shared with the district counsel's staff, except that no attorney who is a bargaining unit member may represent management in personnel or labor matters.

2. In What Areas Must Counsel Maintain Some Level of Legal Expertise?

- a. In all offices, the district counsel should be able to recognize the legal significance of matters when another manager may not. Counsel must have a working knowledge of:
- (1) What is prohibited discriminatory conduct, and how to avoid disparate treatment or a hostile environment;
 - (2) The Agency's affirmative obligation to accommodate handicapping conditions;
 - (3) Merit personnel principles;
 - (4) Prohibited personnel practices; and
 - (5) Procedures for responding to the receipt of a grievance, complaint, or other pleading.
- b. In an office with a recognized bargaining unit, counsel must have a basic understanding of labor law including:
- (1) The union's sphere of influence, including its right to advance notice of formal meetings, its role in the negotiated grievance procedure, and its representative's rights; and responsibilities for using official time;
 - (2) Mandatory and permissive areas for bargaining; and
 - (3) Bargaining unit members' rights to union representation.

3. Who Else Assists Management in this Area?

- a. Administrative officers perform administrative functions such as informing employees of relevant addresses. They also maintain close contact with the HR specialist for your office.
- b. HR specialists consult directly with local management. They maintain official files on grievances and discipline; and review proposals, responses, and decisions in these areas. They can also consult with, or refer local managers to, appropriate technical experts in Headquarters. When counsel advises management in these areas, counsel must ensure that HR review is obtained when required. See SOP 37 52, "Employee Relations," 37 11, "Labor Relations," and 37 71, "Agency Grievance Procedure."
- c. The Administrative Law Litigation Unit (ALLU) represents the Agency in administrative litigation matters involving field employees, including EEO matters.

4. Where can Counsel Turn for Guidance and Assistance?

ALLU attorneys are available to assist field counsel, management, and HR specialists. ALLU attorneys are co-located with the field HR staff and can review documents, strategy, and reasoning with the specialists. The ALLU maintains an administrative law library and can assist you in your research efforts.

5. What Role Does Counsel Play in Advising Fellow Employees Who May Have a Conflict with Management?

Counsel can refer colleagues to the administrative officer for procedural guidance. The employee, including any manager in this situation, must understand that Agency counsel does not and cannot represent them.

6. Who Does Counsel Represent in these Matters?

As in other matters, counsel represents the Agency, but the local manager will usually speak for the Agency. Counsel must ensure that employees understand the limits of any representation, especially when the individual interests of the manager and the Agency's interests diverge, or have the potential to do so. In the EEO context, a principal responding official will be given a letter explaining the role of Agency counsel.

7. What are Counsel's Duties in His or Her Role as a Manager or Supervisor?

- a. Counsel has the same responsibilities as other supervisors to manage employees and interact with colleagues in the office within the bounds of SOPs, Agency and government-wide regulations, and laws concerning standards of conduct, EEO, labor, merit systems, and related fields.
- b. In a union shop, counsel, like other managers, must understand the extent of the union's sphere of interest.

8. What Matters Should Counsel Refer to HR?

HR must review all disciplinary matters and grievance responses. (See SOP 37 52.)

9. What Matters Should Counsel Refer to the ALLU?

- a. Any matter before a third-party adjudicator, other than a court, must be referred promptly to the ALLU. Call the ALLU for instructions on how to transmit the document or files.
- b. These situations include, but may not be limited to:
 - (1) Receipt of an "Unfair Labor Practice Charge" or other communication from the Federal Labor Relations Authority;
 - (2) Receipt of a notice to invoke arbitration;
 - (3) Receipt of any order or communication from the Merit Systems Protection Board; and
 - (4) Receipt of any Order or Communication from the Equal Employment Opportunity Commission.

CHAPTER 13

APPLICANT REPRESENTATIVES' ACTIVITIES AND FEES

1. What is the Purpose of this Chapter?

This chapter describes the activities of applicant representatives, which SBA controls and monitors. Different types of representatives and their various activities are discussed along with the oversight or information collecting role of SBA personnel.

The policy of SBA is to ensure that those who participate in its programs are not subject to fraud, dishonesty, or unnecessary or inappropriate representation that creates excessive fees or costs. While most such arrangements are private contracts arising from arms length agreements, SBA must have a means of reviewing such arrangements and taking appropriate action should abuses be reported or detected.

2. What is SBA's Authority to Monitor Fees?

- a. Section 13 of the Small Business Act (Public Law 85-536, as amended) 15 U.S.C. Section 642, and 13 CFR Section 120.195 provide the statutory authority for SBA to collect and review fee information.
- b. Section 16(a) of the Small Business Act, 15 U.S.C. Section 645 provides general penalties for submitting false information to SBA, including fees.
- c. 13 CFR Section 103 describes SBA's standards for conducting business with the Agency, including procedures for suspension and revocation.

3. May I Discuss an Applicant's Case With Other than an Identified Representative?

Unless a representative is named in the assistance application, or the representative has authorization signed by the applicant, you must not discuss the matter with that representative.

4. What Representative Fees are Prohibited?

- a. Fees for the actual or attempted use of improper influence in seeking SBA assistance.
- b. Contingent fees payable on the granting of such assistance.
- c. Percentage fees based on the value of the assistance sought unless the fees are reasonable and relate to the services actually rendered.

- d. Finder's or brokerage fees unless the fees are reasonable and relate to the services actually rendered. (See 13 CFR §103.4(e).)
- e. Unreasonable fees.
- f. Expense reimbursement deemed unnecessary by SBA.

5. What Fees and Compensation are Reasonable?

- a. Fees for legal, accounting, appraisal, and other technical services actually rendered to the applicant.
- b. Fees for loan packagers or other lender service providers, which must be reasonably related to the services, actually provided. Compensation agreements must provide that SBA may require reductions or refunds for fees deemed unnecessary or unreasonable.

6. How Do I Determine What Fees are Reasonable?

- a. Rates for various services vary due to many factors such as locality, complexity, urgency, time and effort required, specialized skills required, and others. Specific standards are therefore not practical, and you must exercise prudent judgment in ruling on reasonableness.
- b. Again, these service contracts between applicant and professional are generally arms length agreements presumed reasonable absent a complaint or unusual circumstance causing SBA to initiate an inquiry.

7. What Forms Does SBA Use to Monitor and Control Fees?

- a. Applicants by law must report representative fees to SBA (Section 13 Small Business Act (Public Law 85-536, as amended), 15 U.S.C. Section 642 and 13 CFR §120.195). SBA uses SBA Form 159 to identify such fees. Note that 13 CFR §103.5 does provide for the use of a suggested form agreement for Lender Service Providers.
- b. Note that the SBA Form 159 is also required from participating lender's representatives where the applicant is responsible for the fee.
- c. Collection of this information is a regulatory requirement and the importance of full and accurate reporting must be impressed on participants, applicants, and representatives.

- d. The SBA Form 159 must be signed and dated by all parties, and must contain or have attached all relevant explanations or itemizations.
- e. The representative is required to include an itemization by schedule attached of services rendered, date and time spent, and a description of the service when the compensation is more than \$1,000. Generally in the case of licensed professionals such as accountants and legal representatives, hourly rates are also specified. This information is critical to an analysis of the reasonability of a fee or expense. Again, SBA reserves the right to require documentation of any fee or expense as the Agency deems necessary and appropriate.
- f. Where certain activities by a representative, such as repeated office visits, gratuitous correspondence, or others, raise concerns that a fee may be unnecessary or excessive, you may require other forms of documentation such as diaries as deemed appropriate to your assessment of a fee's reasonableness. Bear in mind that some SBA Form 159s will contain disclosure of services not directly related to the application process and should not be included in the reasonability assessment.

8. Who Determines Reasonableness?

- a. Fees are generally assumed to be reasonable absent complaint or a specific concern that causes an agency inquiry. However, when an inquiry is conducted, the determination authority is delegated to the office manager as follows:

Branch Office:	Branch Manager
District Office:	District Director
Field Center (Processing, servicing, litigation, etc.):	Center Manager

- b. In all cases, the deciding official relies on the analysis and recommendation of the appropriate operational division for accounting, consulting, packaging, and other such fees, and on counsel for legal fees. Further, most cases will require the analysis and recommendation of a participating lender.

9. What Action Does SBA Take if a Representative Refuses to Execute or Document a Compensation Agreement?

- a. If there is reason to determine that the applicant is substantially at fault, you must refer the matter immediately to Associate General Counsel for General Law.
- b. If not, the assistance requested shall be continued while the representative is advised specifically of the regulatory requirements and the penalties such as suspension or revocation, which may be assessed by SBA.

- c. Further, the applicant should be advised not to pay any fees still outstanding without SBA approval.

10. What Action Should SBA Personnel Take Where There is Indication of Nondisclosed Compensation or Representation?

Any such cases should be fully documented and sent to the Office of Inspector General, Investigations Division, for further action.

11. Who Has the Final Authority to Suspend or Revoke a Representative's Privilege to Appear Before SBA?

13 CFR §103.3 describes the authority that rests with the Administrator or designee to take final action to suspend or revoke that privilege. 13 CFR Section 103.4 describes acts that could justify such a decision.

Appendix 1
Index to Forms and Reports

<u>Form</u>	<u>Paragraph</u>
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Report

Reserved

Appendix 2a
Field Counsel Workload Statistical Report
Your DISTRICT OFFICE
QUARTER ENDING

LOAN CLOSING**LOANS APPROVED QUARTER**

Lender Loans(GP/CLP)

LowDoc Loans.....

CDC (504).....

Total Approved Quarter

504 LOANS CLOSED DURING QUARTER

CDC (504) SBA

CDC (504) Priority CDC Atty.....

Total Closed Quarter

TRANSACTIONAL WORK

Authorizations Reviewed..... ..

Written Eligibility Loan Opinions ..

Written Opinions (Non-327).....

Verbal Consultations

327s Reviewed

Purchase Reviews

Compromises

Non-judicial Foreclosures

8(a) Contract Reviews

8(a) eligibility/termination.....

FOIA/Subpoenas

Co-Sponsorships Reviewed

Training Sessions

Franchise Reviews

Other_____

STAFFING

Attorneys

Paraprofessional

Sec/Clerical

Total Staff

Staff Changes (+-)(2).....

- (1) Narrative report attached.
- (2) Discuss in narrative.

SBA Form 2084 (8/98)

LITIGATION

Cases Beginning of Quarter.....

Closed During Quarter.....

Percentage of Cases Closed.....

New Cases Referred.....

Total Cases End of Quarter.....

CASE ASSIGNMENTS

Cases Handled by DOJ/USA.....

Cases Handled by SBA/SAUSA..

Cases Handled by Lit Unit.....

Cases Handled by Lenders.....

Total Cases End of Quarter.....

CASE TYPES

Bankruptcies.....

 Chapt. 7 -

 Chapt. 11 -

 Chapt. 12 -

 Chapt. 13 -

 Adversary -

Judicial Foreclosures.....

Suits Against Lenders.....

Suits for Deficiencies.....

Misc. Claims Litigation.....

SBA as Defendant.....

2410 Actions.....

CASE AGING

Cases 24 months beg quarter.....

Cases over 24 months closed.....

Percent Over 24 Month Closed..

JUDGMENTS AND SETTLEMENTS

Judgments/Settlements (#).....

Judgments (\$).....

Settlements (\$).....

Appendix 3a

**Religious Eligibility Worksheet
(SBA Form 1971)**

I. NAME OF LOAN APPLICANT:

II. TYPE OF LOAN REQUESTED:

III. AMOUNT OF LOAN REQUESTED:

IV. USE OF PROCEEDS:

V. RELIGIOUS COMPONENT OF BUSINESS

A. Is the business or its activities connected, associated or affiliated with a religious organization in any way?

Yes ___ No

If yes, explain nature and extent of relationship:

B. Nature of the religious component (please check all that are applicable).

___ Sale of religious books, music, artifacts, gifts, and other religious items.

___ Religious instruction, counseling or indoctrination with regard to any items sold (including those listed above).

___ Religious instruction, indoctrination or counseling whether to adults or children (includes use of religious material at day care facilities).

___ Religious broadcasting (includes religious music, religious programming including instruction, indoctrination, counseling, and religious services).

___ Publication of newspaper, journal or other religious

publication.

- Creation or development of religious materials (including writings, music, artifacts, computer software, religious art and so forth).
- Sale or distribution of religious publications.
- Prayer, meditation, religious worship, religious service or proceeding.
- Provision of Reading room or other space to conduct lectures, readings, prayer, worship, meditation or other activities related to religion.
- Other:

Comments or explanation:

- C. Describe the quantity or extent of the religious component or activities with regard to the entire business. In this regard, examine both the actual religious activities (particularly those that involve teaching, instructing, counseling or indoctrinating) and whether the religious component pervades or permeates the entire business.

VI. DETERMINATION

- Eligible
- Recommended Not Eligible

Comment or Explanation:

 DISTRICT COUNSEL
 SBA FORM 1971 (4/96)

DATE:

Appendix 3b

**Eligible Passive Company Worksheet
(Also see 13 CFR §120.111)**

	YES	NO
1. Is the Operating Company "small" under the appropriate size standard, and otherwise an eligible small business?	___	___
2. Is the Passive Company "small" under the appropriate size standard, and otherwise an eligible small business?	___	___
3. Would the proposed use of proceeds be eligible if the Operating Company was obtaining the financing directly?	___	___
4. Is the Passive Company using the proceeds to acquire, lease, improve, or renovate real or personal property that it leases to the Operating Company?	___	___
5. Is the lease between the Passive Company and the Operating Company in writing and subordinated to SBA's mortgage (or other security instrument)?	___	___
6. Has the Passive Company furnished an assignment of rents?	___	___
7. Is the term of the lease (including options to renew exercisable solely by the Operating Company) at least equal to the term of the loan?	___	___
8. Is the Operating Company a guarantor or co-borrower? (For 7(a) loans that include working capital, the Operating Company must be a co-borrower.)	___	___
9. Has each 20 percent owner of the Passive Company and the Operating Company guaranteed the loan? (A trustee must execute the guarantee on behalf of a trust.)	___	___
10. If the borrower is a trust, does it comply with all of the provisions in 13 CFR §120.111(b)?	___	___

* * * * *

A "No" response to any question indicates that the Passive Company is not eligible for SBA assistance.

SBA Form 2085 (12/98)

Appendix 3c
Certification of No Change
on Behalf of Registered Franchisor

As authorized representative of [FRANCHISOR], I certify as follows:

1. On _____, 1998, (the "Registration Date"), the U.S. Small Business Administration ("SBA") listed [the FRANCHISE PROGRAM] on its Franchise Registry as complying with SBA's franchise eligibility guidelines.
2. This registration followed SBA's review of a package of documents (the "Franchise Documents") that Franchisor requires its franchisees to sign in order to participate in the [FRANCHISE PROGRAM].
3. There have been no material revisions to the Franchise Documents since the Registration Date.

Name
Title
Authorized Representative of [FRANCHISOR]

SBA Form 2086 (12/98)

Appendix 3d

Certification of Change on Behalf of Registered Franchisor

As authorized representative of [FRANCHISOR], I certify as follows:

1. On _____, 1998, (the "Registration Date"), the U.S. Small Business Administration ("SBA") listed [the FRANCHISE PROGRAM] on its Franchise Registry as complying with SBA's franchise eligibility guidelines.

2. This registration followed SBA's review of a package of documents (the "Franchise Documents") that Franchisor requires its franchisees to sign in order to participate in the [FRANCHISE PROGRAM].

3. There have been no material revisions to the Franchise Documents since the Registration Date except:

<u>Document</u>	<u>Section</u>	<u>Page</u>
-----------------	----------------	-------------

4. I submit with this certification a revised Worksheet, a complete set of the current Franchise Documents, and a redlined set of the Franchise Documents indicating all revisions since the Registration Date.

Name
Title
Authorized Representative of [FRANCHISOR]

SBA Form 2087 (12/98)

Appendix 3e

Franchise Eligibility Guidelines

A. CONTROL

1. Franchisor must not, either directly or through an affiliated entity or contract agent, subject Franchisee to such a degree of control that Franchisee does not have the independent right to both profit from its efforts and bear the risk of loss commensurate with ownership.
2. The prohibition against affiliation does not prevent Franchisor from imposing upon Franchisee quality control and other conditions governing how the Franchised Business will be operated (such as, but not limited to, product quality, training, premises design, payment of royalties, advertising, or accounting format). Different controls and conditions may exist within a Franchise System to account for varying unit attributes such as location, community demographics, seasonality, and type of unit. Franchisor also may provide special support and impose special conditions if Franchisee has specific needs for training, supervision, consultative assistance or financial relief. Standard conditions must be described in sufficient detail in the franchise agreement or otherwise in writing. Special conditions or support are not necessarily evidence of excessive control. Franchisor may provide, directly or through contract agents, accounting, collection, supervision, and other management services under contract (either in the franchise agreement or under separate contract), so long as the ultimate authority and control over the activities and the business operations rest with the Franchisee.
3. Franchisor may not:
 - (a) Set the Franchisee's net profit from the Franchised Business;
 - (b) Prescribe or strictly control the right of Franchisee to withdraw increases in the net worth of the Franchised Business, although it may require the Franchisee to maintain in the Franchised Business a reasonable capital reserve varying in amount and calculated with reference to the amount of its revenues and payables;
 - (c) Manage the daily operations of the Franchised Business for an extended period of time, except if Franchisee is ill or disabled, or the Franchisee, Lender, or SBA either requests Franchisor's assistance or agrees to Franchisor's proffered support and supervision, directly or through contract agents;
 - (d) Hire, fire and otherwise directly control Franchisee's employees (unless the exception in subparagraph (c) above is operative); or

- (e) Require Franchisee to deposit all receipts or revenues into an account which Franchisor controls, or from which withdrawals may be made only with Franchisor's consent.

(Nothing prevents the Franchisee and Franchisor from entering into a commercial financing arrangement for the Franchisee's receivables or assets not financed with the CDC/SBA loan. Franchisor may also require a portion of receipts or revenue to be paid into a controlled account to repay loans to the Franchisee.)

B. LEASING FROM FRANCHISOR

During the term of the SBA-guaranteed loan, Franchisor may not terminate any Real Estate Lease unless an uncured default has occurred under the terms of the Real Estate Lease or the Franchise Agreement.

C. RENEWAL

During the term of the SBA-guaranteed loan, the terms of the renewal agreement offered to Franchisee must be no less favorable to Franchisee than either (a) the terms in Franchisor's then-current form of Franchise Agreement or (b) the renewal terms offered by Franchisor to other comparable, renewing franchisees. Renewal terms may include requirements for upgrading or renovating the Franchised Business premises to conform to the Franchisor's then-current specifications.

D. TRANSFER

Franchisee (or the legal representative of an owner or principal of the Franchisee upon the death, disability, incompetency, or bankruptcy of one or more of the Franchisee's owners or principals, assignee or other successor) must be able to transfer its interest in the Franchised Business or franchise ownership entity at any time to an assignee, successor, or transferee (collectively "Transferee") meeting the Franchisor's qualifications. Franchisor may evaluate and approve or disapprove a proposed Transferee as a qualified successor in accordance with the requirements, standards, and conditions published in the Franchise Agreement or otherwise set forth in writing. Consent must not be unreasonably withheld or delayed.

E. DEFAULT AND TERMINATION

1. The Franchise Agreement must identify:
 - (a) All events of default;
 - (b) Those events of default which will constitute the basis for termination of the Franchise Agreement ("Defaults");
 - (c) The written notice of termination which Franchisor will give Franchisee, Lender or CDC, and SBA for each Default;
 - (d) Any Defaults which are grounds for automatic termination and for which there is no opportunity to cure ("Automatic Termination"); and
 - (e) The time for cure which Franchisor will give for all other Defaults.
2. During the term of the SBA-guaranteed loan, Franchisor may terminate the Franchise Agreement only for Automatic Terminations and uncured Defaults. A series of cured Defaults within a specified period of time, chronic deficiencies, or repeated violations can be considered an "uncured" Default, if identified clearly as such in the Franchise Agreement. Franchisor must give Franchisee the written notice and opportunity to cure provided for in the Franchise Agreement or Real Estate Lease. Franchisor shall not confess judgment against Franchisee or proceed against Franchisee through a warrant of attorney, unless the terms of a workout or restructure agreement approved by SBA provide for such remedy.

Appendix 3f
Sample Eligibility Opinion
MEMORANDUM

Date:

To: _____, Loan Officer, Credit and Underwriting

From: _____, Advisor Attorney or District Counsel

Subject: Eligibility of a Franchisee for SBA Assistance

You have requested an opinion as to the eligibility of a proposed franchisee (name) for SBA assistance.

The controlling provision of the Code of Federal Regulations for assistance to franchisees is found at 13 CFR §121.103(g), which states:

The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions generally will not be considered, in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions on the sale of the franchise interest.

After review of the (name) Uniform Offering Circular and the proposed franchise agreement with full regard to the concerns and limitations set out in 13 CFR §121.103(g), it is my considered legal opinion that the applicant franchisee would not be affiliated with the franchisor after entering into the proposed franchise relationship and, if otherwise qualified, is eligible for SBA assistance.

Attorney Advisor/District Counsel

Appendix 3g

Loan Authorization Checklist

BORROWER:

LOAN NO.:

Reviewed by:

PROGRAM TYPE: _____

Signature/Date

- ___ Authorization complies with the Small Business Act and Agency regulations and conforms to State law.
- ___ Authorization contains only essential, standard boilerplate provisions, or any non-standard provision has been reviewed and approved by Legal.
- ___ Size, business and program eligibility matters have been recognized and resolved.
- ___ Repayment period is acceptable for the type of collateral involved. (Repayment period may not exceed 25 years for real estate, machinery, equipment, furniture and fixtures; may not exceed 10 years for working capital.)
- ___ Interest rate is within applicable limits. (May not exceed two and one quarter percent over prime for loans with maturity of less than 7 years; may not exceed two and three quarters percent over prime for loans with maturities of seven years or greater; for loans under \$25,000, interest rate spreads may be two percent higher; for loans between \$25,000 and \$50,000, the interest rate spread may be 1 percent higher than stated). **7(a) loans only**
- ___ Proposed "use of proceeds" is eligible and consistent with the loan officer's report.
- ___ When the collateral is located on leased property, appropriate conditions such as term of lease, landlord's waiver and assignment of the lease should be considered.

COLLATERAL:

- ___ When real estate is taken as collateral, title insurance or a title search should be required.
- ___ Where commercial real estate is taken as collateral, the "environmental clauses" are included in the authorization.

SBA Form 2088 (12/98)

- ___ All owners of the real estate are required to execute the mortgage/deed of trust.
- ___ A "purchase money security interest" is required where loan proceeds are used to purchase personal property. (All parties holding title to the property must be identified as "borrowers".)
- ___ A list of personal property securing the loan is required.
- ___ Guaranties are required from all persons owning 20 percent or more of either the small business concern or the eligible passive concern.
- ___ "Affiliates" of the borrower have been required to guarantee the loan.
- ___ The operating small business concern has been required to guaranty the loan to an eligible passive concern.
- ___ Where the loan is to an eligible passive concern, the authorization requires an assignment of lease and rents.
- ___ "Flood hazard" provisions are included.
- ___ Hazard insurance is required.
- ___ Life insurance is required.
- ___ The IRS tax return verification clause is included.
- ___ The "child support" provision is included.
- ___ Where loan proceeds are used for construction/renovations/remodeling, the authorization contains construction clauses and specifies the acceptable evidence of completion.
- ___ The seismic paragraph is included in the authorization where loan proceeds are used for new construction.
- ___ The proper clause relating to the borrowing entities legal existence is included in the authorization. e.g., certificate of partnership, corporate certificate of good standing, etc.
- ___ The signature page reflects the borrowing entity's form of business (e.g., partnership, corporation, limited liability company, sole proprietorship).
- ___ Have other issues been recognized and resolved?
 - ___ Franchise clause and eligibility
 - ___ Does the business require a license?

- ___ Is purchase of an existing business explained?
- ___ Particular program requirements (specify)
- ___ Other miscellaneous issues (specify)

OTHER COMMENTS:

Appendix 4a

Sample Loan Approval/Closing Letter

DATE

Mr. F. Lender
 First National Bank
 100 Financial Street
 Ourtown, ST 00001

Re: Generic Industries
 GP-123,456-1000-OUR

Dear Mr. Lender:

Enclosed is the Loan Authorization and Loan Agreement approving a __ % guaranty of a loan for \$_____ to Generic Industries. Please read the Authorization carefully since it sets forth the terms and conditions under which SBA agrees to guaranty this loan. Both your Bank and the borrower must sign the Authorization.

The amount of SBA's guaranty fee is \$____. Please send a bank check for this amount to Small Business Administration, Denver, CO 80259 (no street address is required). SBA must receive the guaranty fee within 90 days of the date of the Loan Authorization.

The Lender must use the following enclosed forms:

- | | | |
|---------------|---|--|
| SBA Form 147 | - | Note (Terms must agree with the terms in the Loan Authorization) |
| SBA Form 148 | - | Guaranty |
| SBA Form 155 | - | Standby Agreement |
| SBA Form 159 | - | Compensation Agreement (To be completed by borrower's representatives charging fees in connection with this loan) |
| SBA Form 1050 | - | Settlement Sheet (Must be completed for each disbursement and must conform to the uses of proceeds identified in the Loan Authorization) |

SBA Forms 601, 722, and 793, all of which relate to Federal Equal Employment Opportunity and Non-discrimination requirements relating to Government guaranteed loans.

You may use your own forms for all other loan or collateral documents. All loan and/or collateral documents should bear the same date. The note terms must agree with the terms in the loan authorization especially as to the initial interest rate and the applicable rate spread on variable interest rate loans. The lender or its closing counsel must verify that the loan has the required lien positions. The lender must disburse the loan in accordance with the requirements set forth in the SBA Form 1050, Settlement Sheet, both as to the use of the funds and the manner of disbursement.

After disbursement of the loan, the lender must send to our Legal Technician the enclosed Lender Loan Closing Certification form. Should you have legal questions about the closing, please contact _____ at _____. For all other questions, please contact _____ at _____.

Very truly yours,

Supervisory Economic Development Specialist

Appendix 4b
Loan Closing Form – SBA Form 2004



CERTIFICATION TO THE
U.S. SMALL BUSINESS ADMINISTRATION (SBA)

BORROWER: _____

LOAN NO: _____

LENDER certifies to SBA that the following representations are true and correct to the best of Lender's knowledge, information, and belief:

1. The above loan was closed in accordance with SBA's loan authorization;
2. The note is dated _____ ;
3. The loan matures on _____ ;

4. The date of first disbursement was _____;
5. The date of final disbursement was _____;
6. The total amount disbursed equaled _____;
7. The guaranty fee was sent to SBA Denver Finance Center on _____;
8. All required Compensation Agreements (SBA Form 159) are attached;
9. The individual signing this certification on behalf of the participant is fully authorized to do so.

LENDER: _____

BY: _____
SBA Form 2004 (11/98)

Appendix 4c

Sample 504 Loan Closing Checklist

(Non-expedited and priority CDCs)

CLOSING DATE:

SBC/BORROWER:

LOAN #:

CDC CONTACT:

CDC ATTORNEY:

SBC ATTORNEY:

LENDER:

LENDER CONTACT:

MAIN DOCUMENTS TO BE EXECUTED BY PARTIES

- ___ 1. Authorization (confirm when it expires)
- ___ 2. Promissory Note (SBA Form 1505 (10/91)) & duplicate
 - **AMOUNT:**
 - **Assigned to SBA**
- ___ 3. Development Company Debenture & duplicate (SBA Form 1504 (11/86))
- ___ 4. Use of Proceeds (SBA Form 1429 (7/91))
- ___ 5. Servicing Agent Agreement (SBA Form 1506 (12/91)) - add language: **The borrower's total monthly obligation shall include a servicing fee paid to SBA of one eighth of one percent (1/8 of 1%) per annum on the outstanding balance of the Note or lease determined at 5-year anniversary intervals at the beginning of such interval.**
- ___ 6. Authorization Agreement for Pre-authorized Payments (Debits) & duplicate
- ___ 7. CDC Resolution & duplicate (SBA Form 1528 (12/92))

SECURITY FOR INDEBTEDNESS

- ___ 8. Second Mortgage (SBA Form 928 (11/85) **add statutory conditions, & power of sale and add "under seal"**
- ___ **Assigned to SBA**
- ___ 9. Proof of Injection
- ___ 10. Security Agreement (SBA Form 1059 (10/86))
- ___ 11. UCC Financing Statements - Local/ State/ Registry - **Proof of recording**
- ___ **Assigned to SBA** - Local/ State/ Registry - **Proof of recording**
- ___ 12. Guaranty (SBA Form 148 (5/87))

- ___ 13. Security for Guaranty:
- ___ 14. Lease (**All leases shall be junior to SBA mortgage and assignment of Lease**)
- ___ -- Assignment of Lease to SBA
- ___ 15. Standby Agreements
- ___ 16. Hazard Insurance on Collateral Pledged - Listing SBA - 15 day notice provision
- ___ 17. Flood Insurance on Collateral Pledged - Listing SBA/ or letter from insurance agent or town that locus not in flood plain (CDC)
- ___ 18. Life Insurance AMOUNT:
- ___ -- Absolute Collateral Assignment to SBA
- ___ 19. Title Insurance Policy - showing recorded mortgage to CDC and assignment to SBA - **Policy is to list mortgages "to be discharged" upon receipt of Debenture funds**

Policy shall **not** contain a survey exception, or any of the following standard exemptions:

1. Rights or claims of persons in possession;
2. Easements or claims of easements not shown by the public records, boundary-line disputes, overlaps, encroachments, title to filled lands (if any) and any matters not of record which would be disclosed by an accurate survey and inspection of the premises;
3. Any lien, or right to a lien, for services, labor or material, heretofore or hereafter furnished, imposed by law and not shown by the public records)

All leases on land and building shall be junior to SBA mortgage and Assignment of Lease

Good, clear, record and marketable title must be in name of SBA mortgagor subject only to the bank lien in amount approved by authorization.

CONSTRUCTION/ M&E DOCUMENTS

- ___ 20. Certificate of occupancy
- ___ 21. Evidence of Licenses to operate
- ___ 22. Certification by CDC
- ___ 23. Certification by Lender re: Project completion & disbursement of funds.
- ___ 24. Appraisal of collateral
- ___ 25. Environmental Report

INTERIM LENDER DOCUMENTS

- ___ 26. First mortgage and note
- ___ 27. Interim note and mortgage
- ___ 28. Discharge of interim mortgage
- ___ 29. Assignment of interim mortgage
- ___ 30. Dragnet release/waiver

CORPORATE DOCUMENTS

- ___ 31. Certificate of Legal Existence
- ___ 32. Certificate of Good Standing
- ___ 33. Corporate Resolution
- ___ 34. Employer ID #

REPRESENTATIVES DOCUMENTS

- ___ 35. Opinion of Borrower's Counsel
- ___ 36. UCC opinion
- ___ 37. Compensation Agreements

Borrower's Counsel

Borrower's Accountant

CDC's Counsel

MISCELLANEOUS DOCUMENTS

- ___ 38. Certification re: taxes

OTHER

Appendix 4d**Documents Required to be Submitted by
Expedited and Priority CDCs**

- SBA Form 1504 - Debenture
- SBA Form 1505 - Note
- SBA Form 148 - Guaranty(ies)
- SBA Form 1506 - Servicing Agent Agreement
- SBA Form 1429 - Use of Proceeds

CDC Certification

Opinion of CDC Counsel

504 Loan Closing Checklist

You may review additional documentation if you feel that it is necessary to ensure that a particular loan is closed in a legally sufficient manner.

Documentation that establishes compliance with SBA's rules governing Eligible Passive Concerns is an example of additional documentation that you may want to review prior to sending documents forward for a debenture sale.

Appendix 5a

Purchase Review Checklist

DATE OF REPORT

LOAN NO.

AMOUNT OF LOAN\$

BORROWER

ADDRESS

CITY, STATE & ZIP

PARTICIPANT

Loan is to be serviced by SBA __ Lender __ after purchase.

Counsel must determine whether the lender complied with the provisions of SBA regulations, Guaranty Agreement, Authorization, SBA policy, and applicable law in making, closing, disbursing, and servicing the loan.

Factors to be considered:

1. Notice of default: Was it timely by the lender to SBA?
2. Has lender made demand for payment from borrowers and guarantors? If so, when and upon whom:
3. Collateral:
 - a. Were all collateral documents received from the lender?
 - b. Are all collateral documents legally sufficient?
 - c. Do we have the lien position(s) required by the authorization?
 - d. Is the lien search on personal property current?
 - e. Has the condition and location of the collateral been verified?
 - f. Was the collateral converted, released or sold? If released for consideration or sold, were the proceeds applied to the SBA debt?
4. Use of Proceeds: Does it conform substantially with the authorization?

5. Did Participant advise all guarantors of changes in loan terms and/or conditions?
6. Is there any evidence of fraud, negligence or misrepresentation? If answer is "Yes", was I.G. report made?
7. Did Lender take any action that would create a conflict of interest or confer any preference on the lender in collection or lien position with respect to SBA's position or the shared SBA/lender position of the guaranteed loan?
8. Are there any deficiencies that will result in a loss to the Agency? What is the estimated amount of the loss?
9. Is there any evidence of casualties, losses or deaths?
10. Is there any pending litigation? Have obligors or guarantors raised any defenses to liability? Has Lender taken or failed to take any action during the litigation that has or could cause loss to the Agency?
11. Did Lender request purchase within 120 days after maturity of the loan?
12. The following deficiencies must be corrected before SBA will be obligated to purchase:

Comments of Counsel:

It is my opinion that SBA **IS**___ **IS NOT**___ legally obligated to honor its guaranty under the guaranty agreement.

District Counsel/General Attorney (date)

SBA Form 2090 (12/98)

Page 2
Appendix 5b

Lender Outside Counsel Fee Checklist

FACTORS TO BE CONSIDERED:

1. Was litigation approved?
2. Were litigation actions within the original parameters?
3. Were legal fees within approved limits?
4. If litigation did not receive SBA's prior approval or fees exceed approved ceiling, did SBA receive benefits or recovery from the litigation which justify reimbursement?
5. Do fees exceed those charged by attorney to lender on non-SBA loans?
6. Did in-house counsel charge fees?
7. Did lender prevail in litigation?
8. Did actual recovery meet estimated recovery?
9. Was litigation completed in a timely manner?
10. Are total fees reasonable in light of recovery?
11. Review of Invoice Itemization:
 - a. Does the invoice list each activity performed, its date, the attorney/legal professional who performed the work, a detailed description of the nature and substance of each task performed and the time spent on each task?
 - b. Are there double-billed fees?
 - c. Are the hourly increments reasonable?
 - d. Was each task necessary to litigation?
 - e. Was the time spent to perform each task reasonable?
 - f. Was the hourly rate or utilization of personnel reasonable in light of the simplicity/complexity of the task?
 - g. Were non-legal fee costs/expenses reasonable and necessary to advance litigation?

- h. Were fees charged for non-litigation matters connected with SBA purchases, compliance with SBA regulations, remediation of documentation problems?
- i. Were any fees incurred in connection with counterclaims or affirmative defenses raised against the lender which arose as a result of the lender's legally deficient documentation or unapproved servicing/liquidation activities on the account?
- j. Were any fees incurred in connection with counterclaims or affirmative defenses raised against the lender which are related to the lender's side loan?
- k. If lender had side loans, are the fees to be reimbursed consistent with pro-rata share agreement?

SBA Form 2095 (12/98)

Appendix 5c

Compromise Review Checklist

The compromise settlement of an Agency claim for less than the full amount due is appropriate when it can be ascertained that the obligor's financial ability does not reasonably permit full payment of the claim amount. There is, however, little basis for compromise in instances where the liability of the obligor is clear and the Government can collect fully without protracted litigation, undue administrative or out-of-pocket expense.

What is Counsel's Role in the Review of Compromise Actions?

In the compromise 327 action, counsel must comment on, at a minimum, the following:

- a. The adequacy of the offer compared with other means of recovery;
- b. The sufficiency of the documents that support the offer; and
- c. Litigative risks and probabilities.

Factors to be considered:

1. Is the potential recovery greater by pursuing other options including litigation?
2. Do we have a reasonably current financial statement from the offeror plus a statement of income and expenses?
3. Has the offeror provided a financial statement on SBA Form 770 or DOJ Form 95?
4. Has the offeror provided a complete and signed SBA Form 1150, "Offer in Compromise?"
5. Does the Agency have a current credit report?
6. Does the Agency have all supporting information needed in order to determine ownership, current property values and equity available to SBA?
7. Are there any legal issues that must be considered in establishing values, (e.g. homestead exemptions)?
8. Does the Agency have signed copies of Federal Income Tax returns or other verification of income?
9. Has the offeror revealed the source of funds for payment?

10. Has the offeror provided information regarding pending inheritance or established trusts including supporting documentation?
11. Does the offeror have any valid defenses to the SBA claim (e.g., Statute of Limitations, documentation problems, lender liability issues, commercially reasonable sale, etc.)?
12. Is the offeror or borrower in insolvency proceedings?
13. Does this compromise offer involve a "going" business?
14. Has this case file been referred to the Department of Justice?
15. Does the Agency have knowledge of fraud, substantial misrepresentation, or violation of the law on the part of the offeror?
16. Has there been an assessment of the offeror's ability to satisfy the compromise offer?
17. Has our participant lender agreed to the action?
18. Does the Field Office have authority to take final approval action?

SBA Form 2094 (12/98)