

**OHIO CAPITAL ACCESS PROGRAM PARTICIPATION AGREEMENT**

This Ohio Capital Access Program Participation Agreement (the "Agreement") is entered into as of \_\_\_\_\_ [Insert Date], between the *State of Ohio Department of Development* (the "Department"), and \_\_\_\_\_ (the "Lender").

**RECITALS**

- A. Section 122.602 of the Ohio Revised Code created the Capital Access Loan Program, the provisions of which are governed by the provisions of Section 122.60 through 122.605 of the Ohio Revised Code (O.R.C.) (collectively, the "Capital Access Loan Program").
- B. The Capital Access Loan Program was established to assist participating financial institutions in making loans to certain businesses that face barriers in accessing working capital and obtaining fixed asset financing.
- C. Pursuant to the provisions of the Small Business Jobs Act of 2010 (Title III of the Small Business Jobs Act of 2010, Public Law 111-240, 124 Stat. 2568, 2582), the United States Congress appropriated funds to the United States Department of Treasury to be allocated and disbursed to states that have created programs to increase the amount of capital made available by private lenders to small businesses.
- D. On September 2, 2011, the Department entered into the State Small Business Credit Initiative Allocation Agreement with the United States Department of the Treasury to use the funds awarded to the Department (the "State Small Business Credit Initiative Funds") to support the existing Capital Access Loan Program
- E. The Department desires to enter into this Agreement with the Lender so that the Capital Access Loan Program and the State Small Business Credit Initiative Fund can be used to support the "Ohio Capital Access Program".
- F. The Department finds that economic development and job creation will best be promoted in *Ohio* through broad-based lender participation in the Program.
- G. The Department and the Lender desire to set forth the terms and conditions the Department will deposit moneys from the Program into the Lender's reserve fund as well as outline the criteria for loan qualification under the Program.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and intending to be legally bound hereby, the parties hereto agree as follows:

Section 1. Definitions. In addition to the words and terms defined elsewhere in the Agreement, each of the following words and terms as used in the Agreement shall have the following meaning unless the context or use indicates another or different meaning or intent, and such definition shall be equally applicable to both the singular and plural forms of the terms as the content may require:

- (a) "Act" means Ohio Revised Code Sections 122.60 through 122.605, inclusive, as from time to time amended.

- (b) “Affiliate,” when describing a relationship with the Lender, shall refer to the same relationship as the relationship between an affiliate and an institution as described in *Chapter 1109.53 of the Ohio Revised Code* with respect to a state bank.
- (c) “Borrower” means the recipient of an Eligible Loan filed or to be filed by the Lender for enrollment under the Department pursuant to this Agreement.
- (d) “Business Purpose” includes, but is not limited to, start-up costs, working capital, business procurement, franchise fees, equipment, inventory, as well as the purchase, construction, renovation or tenant improvements of a place of business that is not for passive real estate investment or residential housing purposes. The definition of business purpose excludes activities that relate to acquiring or holding passive investments such as commercial real estate ownership, the purchase of securities; and lobbying activities, as defined in Section 3 (7) of the Lobbying Disclosure Act of 1995, P.L. 104-65, as amended.
- (e) “Claim” means any claim filed by the Lender pursuant to Section 5.3 of this Agreement.
- (f) “Department” means the Ohio Department of Development or its successor agency.
- (g) “Eligible Business” has the meaning given that term in the Act. For convenience of reference, as of the date of this Agreement, the Act defines “Eligible Business” as follows: a for-profit business entity, or a nonprofit entity, that had total annual sales in its most recently completed fiscal year of less than ten million dollars and that has a principal place of for-profit business or nonprofit entity activity within the state, the operation of which, alone or in conjunction with other facilities, will create new jobs or preserve existing jobs and employment opportunities and will improve the economic welfare of the people of the state. As used in the Act, “new jobs” does not include existing jobs transferred from another facility within the state, and “existing jobs” means only existing jobs at facilities within the same municipal corporation or township in which the project, activity, or enterprise that is the subject of a capital access loan is located.
- (h) “Eligible Loan” means a loan made by the Lender to a Borrower for which the representations and warranties set forth in Section 2.2 are true and the amount does not exceed the statutory limitations outlined in Section 122.602 (e) of the O.R.C., currently \$250,000 for working capital loans and \$500,000 for fixed asset financing, subject to the limitations outlined in Section 4.6.
- (i) “Enrolled Loan” means an Eligible Loan enrolled by the Department pursuant to the terms of Section 4 of this Agreement on or after the effective date of this Agreement as it appears on page one of this Agreement.
- (j) “Principal” is defined (a) for a sole proprietorship, as the proprietor; (b) for a partnership, as each partner; and (c) for a corporation, limited liability company, association or a development company, as each director, each of the five most highly compensated executives, officers, or employees, and each natural person who is a direct or indirect holder of 20 percent or more of the ownership of stock or stock equivalent of the entity.
- (k) “Program Reserve Account” means an interest-bearing money market account insured by the Federal Deposit Insurance Corporation, established and maintained by the Lender (in accordance with Section 122.603(A) of the O.R.C.) and controlled by the Department. The use of such funds in the account is to cover losses sustained by the Lender on Enrolled Loans made by the Lender in accordance the Act and this Agreement.

Section 2.1. Representations by the Department. With respect to any Enrolled Loan, the Department makes the following representations and warranties as of the time of the enrollment:

- (a) The Department is a public body corporate and politic established and acting pursuant to the Act.

- (b) The Department has the necessary power [under the Act], and has duly taken all action on its part required to authorize, execute and deliver this Agreement. This Agreement when executed will be valid, binding and enforceable in accordance with its terms. The execution and performance of this Agreement by the Department will not violate or conflict with any instrument by which the Department is bound.
- (c) The Department will require that all Borrowers and the Borrowers facilities benefiting from the Capital Access Loan be located within the state of Ohio.
- (d) The Department will impose an employee size restriction of no more than 250 with respect to a Borrower's eligibility to participate in the Capital Access Loan Program.
- (e) The Department will impose a maximum term for an Enrolled Loan that does not exceed **15** years for fixed asset term loans and **6** years for working capital lines of credit.
- (f) In accordance with the Act, the Department will impose a restriction on the maximum amount of an Enrolled Loan that is not greater than \$500,000 for fixed asset financing and \$250,000 for working capital loans.
- (g) The Department will permit non-profit entities to be Borrowers in the Program.
- (h) The Department is compliant and will comply with all applicable statutes, rules and regulations, including, to the extent that the Department falls within the scope thereof, the provisions of the Small Business Jobs Act of 2010.

Section 2.2. Representations by the Lender. With respect to any Eligible Loan that the Lender files for enrollment under this Agreement, the Lender makes the following representations and warranties as of the time of each filing:

- (a) The Lender has obtained in writing from the Borrower a Loan Enrollment and Certification Borrower's Information Form in the form of Exhibit 1 containing the following representations and warranties and, based on knowledge that the Lender has, the Lender has no substantial reason to believe that such representations and warranties are not true:
  - (i) The Borrower is an Eligible Business.
  - (ii) The Borrower is a corporation, partnership, joint venture, sole proprietorship, limited liability corporation, cooperative, or other entity (including a state-designated charitable, religious or other non-profit or eleemosynary institution or faith-based organization), which is authorized to conduct business in Ohio.
  - (iii) The proceeds of the Eligible Loan will be used for a Business Purpose.
  - (iv) The proceeds of the Eligible Loan will not be used:
    - (A) To repay delinquent federal or state income taxes unless the Borrower has a payment plan in place with the relevant taxing authority;
    - (B) To repay taxes held in trust or escrow (e.g., payroll or sales taxes);
    - (C) To reimburse funds owed to any owner, including any equity injection or injection of capital for the Borrower's continuance;
    - (D) To purchase any portion of the ownership interest in the Borrower; or

(E) For activities that relate to acquiring or holding passive investments, such as commercial real estate ownership and the purchase of securities; and lobbying activities, as defined in section 3(7) of the Lobbying Disclosure Act of 1995, P.L. 104-65, as amended.

(v) The Borrower is not an executive officer, director, or principal shareholder of the Lender, a member of the immediate family of an executive officer, director or principal shareholder of the Lender, or a related interest of an executive officer, director, or principal shareholder of the Lender. For the purpose of this provision, the terms “executive officer,” “director,” “principal shareholder,” “immediate family,” and “related interest” shall refer to the same relationship to the Lender, whether or not the Lender is a member bank, as the relationship specified for those terms in connection with member banks in Part 215 of Title 12 of the Code of Federal Regulations, including amendments to Part 215 which may be made from time to time.

(vi) The Borrower is not:

(A) a business engaged in speculative activities that develop profits from fluctuations in price rather than through normal course of trade, such as wildcatting for oil and dealing in commodities futures, unless those activities are incidental to the regular activities of the Borrower and part of a legitimate risk management strategy to guard against price fluctuations related to the regular activities of the Borrower;

(B) a business that earns more than half of its annual net revenue from lending activities; unless the business is a non-bank or non-bank holding company Community Development Financial Institution (CDFI);

(C) a business engaged in pyramid sales, where a participant's primary incentive is based on the sales made by an ever-increasing number of participants;

(D) a business engaged in activities that are prohibited by federal law or applicable law in the jurisdiction where the business is located or conducted, including the production, servicing, or distribution of otherwise legal products that are to be used in connection with an illegal activity, such as selling drug paraphernalia or operating a motel that knowingly permits illegal prostitution; or

(E) a business engaged in gambling enterprises, unless the business earns less than 33 percent of its annual net revenue from lottery sales.

(vii) No Principal of the Borrower has been convicted of a sex offense against a minor (as such terms are defined in Section 111 of the Sex Offender Registration and Notification Act (42 U.S.C. § 16911)).

(b) The Lender has provided Director in writing a Lender’s Loan Enrollment and Certification Form in the form of **Exhibit 2** containing the following representations and warranties:

(i) The Lender has not made the Eligible Loan in order to place, under the protection provided by the Program, prior debt that is not covered under the Program and that is or was owed by the Borrower to the Lender or to an Affiliate of the Lender.

(ii) The Lender has not made the Eligible Loan as a refinancing of a loan (other than an existing Enrolled Loan) previously made to the Borrower by the Lender or an Affiliate of the Lender.

- (iii) The Lender has not made the Eligible Loan to cover the unguaranteed portion of a US Small Business Administration (SBA) loan, or, to its knowledge, to cover the unguaranteed portion of a loan guaranteed by any other federal, state or local government or public entity.
  - (iv) The Lender has disclosed to the Borrower information concerning the Capital Access Loan Program as set forth in the Loan Enrollment and Certification – Borrower’s Information Form (the Borrower’s Information Form”), attached hereto as **Exhibit 2**, has provided to the Borrower any required privacy notices required by Lender’s policies, and has processed the Eligible Loan in accordance with Lender’s “customer identification program” and other similar policies and procedures.
  - (iv) No Principal of the Lender has been convicted of a sex offense against a minor (as such terms are defined in section 111 of the Sex Offender Registration and Notification Act (42 U.S.C. § 16911)).
- (c) To the best of its knowledge, Lender is in compliance with all federal, state, and local laws, rules, and regulations to which Lender is subject and there are no regulatory, enforcement or other actions, suits or proceedings pending or threatened against Lender which, if adversely determined, would individually or in the aggregate impair the ability of Lender to participate in the Program or perform its obligations under this Agreement.
  - (d) The individual executing this Agreement on behalf of Lender has been duly authorized and empowered to obligate Lender to the terms of this Agreement.
  - (e) All Enrolled Loans submitted by Lender to the Department for enrollment in the Program shall be valid, binding and enforceable obligations of the Borrowers. Lender shall document the Enrolled Loans in a legally sound manner, which may include a loan agreement containing a confession of judgment, a promissory note containing a cognovit provision and confession of judgment, and security documents such as a mortgage or security agreement and properly filed Uniform Commercial Code financing statements, as the Lender deems appropriate and necessary to support the enforcement and collection of the loan obligation.

Section 3. Establishment of a Program Reserve Account. Unless a Program Reserve Account related to a prior Capital Access Loan Program Agreement is in existence, upon execution of this Agreement, the Lender shall establish a Program Reserve Account in an interest bearing account in the name of the Department for the purpose of receiving all required premium charges to be paid by the Lender and the Borrower, and transfers made by the Department, pursuant to Section 5.1. The Program Reserve Account shall be titled the Director of Development Ohio Capital Access Program Reserve Account. The Department shall be the legal owner of the Program Reserve Account.

For the purposes of this Agreement an existing Program Reserve Account means a Program Reserve Account creating prior to December 19, 2011. If the Lender has an existing reserve fund established under the Capital Access Loan Program, the Lender may submit a request to the Department that the existing reserve fund be combined, at the Department’s discretion, with the Program Reserve Account established under this Agreement to the extent permitted by the existing reserve fund’s governing agreement(s). In the event that a Lender’s existing reserve fund is not combined with the Program Reserve Account, the Lender may submit Claims to the Program Reserve Account or the existing reserve fund to the extent permitted by the existing reserve fund’s governing agreements for loans that were enrolled prior to the effective date of this agreement. A list of any loans outstanding associated with the existing reserve fund must be provided to the Department prior to the combination of the Program Reserve Account with any existing reserve funds. The disbursement percentages set forth in Section 122.603 (d) of the O.R.C. shall apply to the specific Program Reserve Account or accounts as created by the Lender.

The Program Reserve Account shall be invested in a manner consistent with Ohio law and approved by the Department. Interest earned on funds held in the Program Reserve Account shall be deemed to be part of the Program Reserve Account held as an additional Capital Access Loan Program loss reserve.

If Lender participated in the Capital Access Loan Program pursuant to a prior Capital Access Loan Program agreement with the Department, this Agreement continues Lender's participation in the Program subject to certain new Program terms. This Agreement does not supersede any prior Capital Access Loan Program agreement and, if applicable, any corresponding amendment. Any prior Capital Access Loan Program agreement and its amendment(s) will continue to apply to loans enrolled in the Capital Access Loan Program during the term that agreement was in effect. The terms and conditions of this Agreement shall apply to all loans enrolled from and after the date of this Agreement.

Section 4.1. Enrollment of Loans. An Eligible Loan to be filed for enrollment under this Agreement may be made with the interest rate, fees, and other terms and conditions as the Lender and Borrower may agree. The Eligible Loan may be in the form of a term loan or a line of credit, and in the case of a line of credit the amount of the Eligible Loan shall be considered to be the maximum amount that can be drawn down against the line of credit, unless Lender elects to enroll only a portion of the line of credit in the Program, in which case the amount of the Eligible Loan shall be considered to be the amount filed for enrollment.

Section 4.2. Pre-Approval. Lender may submit a Pre-Approval Form for Participating Ohio Capital Access Program Lenders (the "Pre-Approval Form"), attached hereto as Exhibit 3, to the Department in a format acceptable to the Department to determine if a loan will be considered an Eligible Loan for the purpose of enrollment in the Capital Access Loan Program. The Department will review the Pre-Approval Form and provide Lender a written determination of eligibility within five (5) business days of receipt. The Department may request additional information or clarification of the material submitted. Such determination may include contingencies and recommendations in support of enrollment.

Section 4.3. Enrolling a Loan. Only Eligible Loans may be enrolled in the Capital Access Loan Program. In order to enroll an Eligible Loan under the Capital Access Loan Program, the Lender shall file the Eligible Loan for enrollment by delivering to the Department the following:

- (a) A copy of Exhibit 1 and Exhibit 2, the Loan Enrollment and Certification – Borrower's Information Form and Lender's Loan Enrollment and Certification Form, in completed form bearing the execution signature of an authorized officer of the Borrower and Lender respectively.
- (b) Transmittal of the non-refundable premium charges payable as set forth in Section 5.1 in connection with the Enrolled Loan by the Lender and the Borrower, or evidence that such transmittal has occurred.

The Lender shall file the Eligible Loan for enrollment within fifteen (15) business days after the Lender makes the Eligible Loan. For the purposes of this Agreement, the date on which the Lender makes an Eligible Loan shall be deemed to be the date on which the Lender first disburses proceeds of the Eligible Loan to the Borrower, or such earlier date on which the loan documents have been executed and the Lender has obligated itself to disburse proceeds of the Eligible Loan. For the purposes of this Agreement, the filing of an Eligible Loan for enrollment shall be deemed to occur on the date of which the Lender delivers to the Department, delivers to a professional courier service for delivery to the Department, mails to the Department, faxes to the Department, or emails to the Department, the documentation or, in the case of delivery by fax or email, a scanned image of the documentation required by this Section.

Section 4.4. Department Acknowledgement. Upon receipt by the Department of the documentation identified in Section 4.3, the Department shall enroll the Eligible Loan, unless the information provided indicates that it is not an Eligible Loan, and shall mail or otherwise deliver to the Lender, within ten (10) business days of such receipt, an acknowledgement of enrollment, bearing the execution signature of an authorized representative of the Department, including documentation of the amount being transferred by the Department into the Program Reserve Account pursuant to Section 5.1, or the Department's determination that it is not an Eligible Loan. The Department may assign a unique loan identification number to each Enrolled Loan. In accordance with Sections 122.603(D) and 122.02 of the O.R.C., the Director shall disburse in

respect of the first three (3) capital access loans enrolled by Lender in the Capital Access Loan Program an amount equal to fifty percent (50%) of the principal amount of each of such loan from the Capital Access Loan Program Fund and an amount equal to no more than six percent (6%) from the State Small Business Credit Initiative Fund, and the Director shall disburse in respect of each additional Eligible Loan enrolled by Lender in the Capital Access Loan Program an amount equal to ten percent (10%) of the principal amount of each such loan from the Capital Access Loan Program Fund and an amount equal to no more than six percent (6%) from the State Small Business Credit Initiative Fund; provided, however, if a capital access loan is made to an Ohio certified minority business enterprise, then the amount disbursed by the Director in respect of such loan shall be an amount equal to eighty percent (80%) of the principal amount of such loan from the Capital Access Loan Program in lieu of the percentage otherwise set forth in this section. The percent of principal to be provided from the State Small Business Credit Initiative Fund shall be determined by the Department in accordance with Section 3005(d) of the State Small Business Credit Act of 2010 at the time the loan is enrolled, but in no case shall exceed six percent (6%). Such disbursement shall be made promptly after the Director's approval of enrollment.

The percentages set forth in this Section 4.4 are subject to legislative change. Modification of the percentages set forth Section 122.603 of the O.R.C. shall automatically replace the percentages set forth above thirty (30) days after notice is given by the Department to the Lender in accordance with Section 11 of this Agreement regarding the enactment of any legislative change and shall be self-executing so that the Agreement shall be modified in accordance with such notice without any further action by the parties.

In the event that the Department no longer has funds to transfer to the Program Reserve Account or does not have sufficient funds for a transfer matching the Borrower and Lender premium charges, the Department will have no existing or continuing obligation to transfer funds to the Program Reserve Account, the Department will inform the Lender of the funds insufficiency, and the Lender may request that (a) the Department accept the deposit of the Borrower and Lender premium charges in the Program Reserve Account, or (b) a refund of the Borrower and Lender premium charges from the Department if such charges have already been deposited in the Program Reserve Account, in which case the Department shall promptly refund the same.

Section 4.5. Amount Covered. When filing an Eligible Loan for enrollment, the Lender may specify an amount to be covered under the Capital Access Loan Program that is less than the total amount of the Eligible Loan. Unless the context clearly requires otherwise, when used in this Agreement in connection with an Eligible Loan, the words "amount" and "proceeds" shall refer only to the portion of the Eligible Loan covered under this Agreement.

Section 4.6. Refinancing Enrolled Loans. The following provisions shall be subject to the exceptions outlined in Sections 4.7 and 4.8:

- (a) As provided in Section 122.602(I) of the Revised Code, if Lender makes an Eligible Loan to a Borrower that refinances an existing non-Program loan made by Lender, only the amount in excess of the Prior Debt shall be eligible to be enrolled in the Program. Reserve Account Contributions shall be calculated on the amount of the Eligible Loan in excess of the Prior Debt. The Eligible Loan must satisfy all other Program criteria to be enrolled in the Program.
- (b) In the event that an Enrolled Loan is refinanced and the total amount to be covered under the Capital Access Loan Program does not exceed the covered amount of such Enrolled Loan, the Enrolled Loan, as refinanced, may continue as an Enrolled Loan and there shall be no additional premium charges payable or transferred into the Program Reserve Account.
- (c) In the event that an Enrolled Loan is refinanced in an amount which exceeds the amount of such Enrolled Loan, and if the Lender wishes the amount of the refinanced Enrolled Loan to exceed the amount previously enrolled, the Lender shall file again such refinanced Enrolled Loan for enrollment pursuant to Section 4.3 with premium payments and transfers to be made into the Reserve Fund based on the amount of the refinanced Enrolled Loan to be covered that exceeds the amount of the existing Enrolled Loan. In such case, the Lender, at the time of the refinancing,

shall be deemed to have made, with respect to such refinanced Enrolled Loan, the representations and warranties specified for the lender in Section 2.2.

Section 4.7. Lines of Credit Balances. For the purposes of this Agreement, fluctuations in the outstanding balance of an Enrolled Loan that is a line of credit, without increasing the covered amount under the Capital Access Loan Program, shall not be deemed to be a refinancing of such Enrolled Loan. If an Enrolled Loan is a one year line of credit then during the term of this Agreement, the line of credit may continue as an Enrolled Loan for up to thirty-six (36) months after the loan is made to Borrower. Extensions of the line of credit within such thirty-six month (36) period will not require separate applications for enrollment or payment of additional Program Reserve Account Contributions. If a line of credit is extended by a Lender for more than thirty-six (36) months, such extension shall be considered a new loan for which an application for enrollment and payment of Program Reserve Account Contributions will be required.

Section 4.8. Termination as an Enrolled Loan. If the outstanding balance of an Enrolled Loan that is not a line of credit is reduced to zero for a period exceeding 60 consecutive calendar days, that Enrolled Loan shall no longer be considered an Enrolled Loan. If an Enrolled Loan, which is a line of credit, has an outstanding balance of zero for a period of three (3) consecutive years, it shall no longer be considered an Enrolled Loan.

Section 4.9. No Pledge of Faith, Credit, or Taxing Power. The enrollment of an Eligible Loan under the Capital Access Loan Program shall not pledge the faith, credit, or taxing power of the State of Ohio, the Department, or the Capital Access Loan Program. Any assurances, guarantees, or other credit enhancements provided under the Capital Access Loan Program do not pledge the faith, credit, or taxing power of the State of Ohio, the Department or the Capital Access Loan Program, and such enhancements are payable only to the extent of the Program Reserve Account.

Section 4.10. Collateral. Except upon the exercise of the Department's right of subrogation as set forth in Section 5.7, the Department shall have no legal or equitable interest in any collateral, security, or other right of recovery in connection with any loan enrolled in the Capital Access Loan Program and, thus, the Department's consent is not necessary for any amendment to the Lender's loan documents. Moreover, no provision in this Agreement shall be construed to prohibit or restrict the Lender's authority, in its sole discretion, to modify the terms or conditions of an Enrolled Loan in a manner that does not conflict with this Agreement. This Section shall not, however, permit Lender to modify its obligation to make payments to the Program Reserve Account pursuant to Section 5.1.

Section 4.11. Due Diligence. Within the context of the objectives of the Capital Access Loan Program, the Lender agrees to exercise the same degree of care and diligence in the making and collection of the Enrolled Loans as it does in the making and collection of other business loans in the ordinary course of Lender's business.

Section 5.1. Payments and Transfers to the Program Reserve Account. Subject to the provisions of this Section, the Lender shall set the premium charges payable to the Program Reserve Account by the Lender and the Borrower in connection with an Eligible Loan being filed for enrollment with the Department pursuant to Section 4.3. The Reserve Account Contribution for each Enrolled Loan shall be an amount not less than three percent (3%) nor more than six percent (6%), or such other percentages as the Ohio legislature may authorize for the Capital Access Loan Program, of the principal amount of the Enrolled Loan. The Reserve Account Contribution includes both the Program reserve fee required by the Act to be paid by Borrower and the deposit to be made by Lender into the Program Reserve Account. Lender shall set the Program reserve fee payable by Borrower, and such fee shall be an amount not less than one and one-half percent (1-1/2 %) nor more than three percent (3%) of the principal amount of the capital access loan. Lender shall deposit into the Program Reserve Account an amount equal to the Program reserve fee it charges to the Borrower. As provided in Section 122.603(B) of the Revised Code, Lender may recover all or part of the amount of Lender's deposit from the Borrower on such terms as Lender and the Borrower agree.

Upon enrollment of an Eligible Loan pursuant to Section 4.3 of this Agreement, the Department shall transfer into the Program Reserve Account an amount determined as follows:

- (a) In the case of the first three (3) Eligible Loans enrolled by Lender in the Program, an amount equal to fifty percent (50%) of the principal amount of each of such loan.
- (b) Thereafter, an amount equal to ten percent (10%) of the principal amount of each such loan, except that in cases where an Eligible Loan is made to an Ohio certified minority business enterprise, then the amount disbursed by the Director in respect of such loan shall be an amount equal to eighty percent (80%) of the principal amount of such loan in lieu of the percentage otherwise set forth in this section.

Section 5.2. Ownership, Control and Investments of Reserve Fund. All funds credited to the Program Reserve Account shall be the exclusive property of, and solely controlled by, the Department. The Department may not withdraw funds from the Program Reserve Account except as provided for in this Agreement.

Section 5.3 Withdrawals from the Program Reserve Account. The Director shall not withdraw funds from the Program Reserve Account, except as provided for in this Section, which is required by the Act. The Director may withdraw funds from the Program Reserve Account (a) in accordance with Section 122.603(E) of the Revised Code when the balance of the Program Reserve Account exceeds thirty-three percent (33%) of Lender's Eligible Loans then outstanding; and (b) in accordance with Section 122.603(F) of the Revised Code, when the Lender (i) is no longer eligible to participate in the Program, (ii) this Agreement expires and is not replaced, (iii) Lender has no Eligible Loans outstanding, or (iv) Lender has not made an Eligible Loan within the preceding twenty-four (24) months. Lender may withdraw funds from the Program Reserve Account only (1) to refund Reserve Account Contributions in respect of a loan if, pursuant to Section 4.3 of this Agreement, the Director determines that such loan does not satisfy the eligibility criteria for enrollment, and (2) with respect to a Claim approved by the Director, as provided in Section 5.4 of this Agreement.

Interest or income earned on the funds credited to the Program Reserve Account shall be deemed to be part of the Program Reserve Account. Not more than twice in any state fiscal year (July 1 through June 30), the Director may require Lender to release from the Program Reserve Account and pay to the Department up to fifty (50%) percent of the total interest or income that has been credited to the Program Reserve Account since the date of the first Enrolled Loan. Withdrawals authorized under this section need not be returned to the Program Reserve Account.

The Department shall, upon reasonable request of the Lender, periodically provide to the Lender transaction reports indicating the balance in the Program Reserve Account, payments and transfers into the Program Reserve Account, withdrawals from the Program Reserve Account, and interest or income earned on funds credited to the Program Reserve Account. In addition, the foregoing transaction reports shall be available to the Lender for inspection at the offices of Department during normal business hours.

Section 5.4. Claims by Lender to the Program Reserve Account. If the Lender charges off all or part of an Enrolled Loan, the Lender may file a Claim with the Department by submitting a completed claim form in the form attached as **Exhibit 4** bearing the execution signature of an authorized officer of the Lender.

- (a) Prior to submitting any claim against the Program Reserve Account, Lender shall undertake to collect accounts as further described in this Section and in accordance with Section 4.11 of this Agreement. If Lender determines in a commercially reasonable manner and consistent with the Lender's normal practice for managing its commercial loans that all or any portion of an Enrolled Loan is uncollectible, Lender may submit a Claim to the Department for a release of the moneys in the Program Reserve Account. The Claim must be submitted to the Department within one hundred and twenty (120) days of the date Lender determines the Enrolled Loan is uncollectible in accordance with its existing policies and procedures. All Claims shall be submitted in the form

attached as **Exhibit 4** or as then required by the Department. Lender may not submit more than one Claim for any Enrolled Loan. If Lender fails to timely submit the Claim, the Lender waives its right to be reimbursed according to the terms of this Agreement.

- (b) Prior to submission of a claim to the Department for payment from the Program Reserve Account, Lender shall take all reasonable and prudent steps to exhaust all of its rights and legal remedies to collect an Enrolled Loan, including, but not limited to, obtaining a judgment, foreclosure or repossession of collateral, enforcement of corporate and/or personal guarantees, and exercise of set-off rights.
- (c) If Lender files two or more Claims at the same time or substantially the same time and there are then insufficient funds in the Program Reserve Account at that time to cover the entire amount of the Claims, Lender may specify an order of priority in which the Department shall approve the release of the moneys in the Program Reserve Account in relation to the Claims.
- (d) Promptly after receipt of a Claim, the Department shall review the Claim. Lender shall provide such supporting documentation for the Claim as the Department may request. The Director shall notify Lender in writing of his determination to approve or deny any Claim. An approval shall authorize Lender to withdraw from the Program Reserve Account the approved amount of the Claim. Any denial shall state in reasonable detail the reason for the denial. Lender shall not make any withdrawal from the Program Reserve Account prior to its receipt of the Director's written approval.
- (e) No Claim shall be made for an amount that exceeds then-current balance of the Program Reserve Account. Lender shall have no right to receive or claim from the Director, the Department or the State of Ohio any amount in excess of the balance of the Program Reserve Account.
- (f) If subsequent to payment of a Claim Lender recovers from a Borrower any amount for which payment of the Claim was made, Lender shall promptly pay to the Program Reserve Account an amount equal to the amount recovered from the Borrower, less any reasonable expenses incurred by Lender in the normal course of such collection activity. Any Claim that is filed under this Agreement shall be filed within 120 days of the date Lender determines the Enrolled Loan is uncollectible in accordance with its existing policies and procedures. The Lender shall determine when and how much to charge off of an Enrolled Loan in a manner consistent with its normal method for making such determinations on business loans which are not Enrolled Loans.

The Lender's Claim may include the amount of principal charged off, plus up to one hundred twenty (120) days' accrued interest, and an amount which represents Lender's customary and reasonable out-of-pocket expenses incurred in pursuing its collection efforts, including preservation of any collateral. However, in the event that only a portion of the amount of the Enrolled Loan is enrolled in the Program, reimbursement of interest and out-of-pocket expenses will be limited to the ratio of the enrolled portion of the Enrolled Loan to the total amount of the Enrolled Loan. The Lender shall retain documentation in its files evidencing all expenses for which a Claim is filed. The amount of principal, accrued interest and out-of-pocket expenses included in the Claim shall not exceed the principal amount covered under the Program upon enrollment.

#### Section 5.5. Disbursement from the Program Reserve Account.

- (a) Notwithstanding the violation of any other provision of this Agreement by the Lender, upon receipt by the Department of a Claim filed by the Lender in accordance with Section 5.4, the Department shall promptly pay, from funds in the Program Reserve Account, the Claim as submitted, except that the Department may reject a Claim when the representations and warranties provided by the Lender in Section 2.2 were known by the Lender to be false when the Eligible Loan became and Enrolled Loan.
- (b) If there are insufficient funds in the Program Reserve Account to cover the entire amount of the Lender's Claim, the Department shall pay to the Lender an amount equal to the current balance in

the Program Reserve Account, net of interest to which the Department is entitled to under this Agreement. That payment shall be deemed to satisfy the Claim made with the Department and the Lender shall have no other or further right to receive any amount from the Program Reserve Account with respect to that Claim.

Section 5.6. Recovery by Lender Subsequent to Claim.

- (a) If after payment of a Claim by the Department, the Lender recovers from a Borrower any amount for which payment of the Claim was made, the Lender shall promptly pay to the Department for deposit in the Program Reserve Account an amount recovered equal to the payment received from the Department for the Claim, less the Lender's customary and reasonable out-of-pocket expenses, with such amounts being due and payable to the Department on or before thirty (30) days after Lender's receipt of the payment. The Lender shall retain documentation in its files evidencing those expenses. Notwithstanding anything to the contrary herein, Lender shall be required to make the foregoing payment solely to the extent that the amount recovered by Lender from the Borrower for an Enrolled Loan for which Lender made a Claim, when added to the payments received by Lender under such Claim, exceeds Lender's loss on such Enrolled Loan.
- (b) The Lender's recovery of any amount written-off in connection with any loan that is not an Enrolled Loan made to a Borrower, whether or not such Borrower is participating in the Capital Access Loan Program, shall not be paid to the Department for deposit in the Program Reserve Account.

Section 5.7. Subrogation.

- (a) If the payment of a Claim pursuant to Section 5.4 has fully covered the Lender's loss on an Enrolled Loan, or if the payment of a Claim pursuant to Section 5.4 when combined with any recovery from the Borrower, has fully covered the Lender's loss, the Department, upon its request, shall be subrogated to the rights of the Lender with respect to any collateral, security or other right of recovery, in connection with the Enrolled Loan, which has not been realized upon by the Lender.
- (b) The Lender shall, upon receipt of such request from the Department pursuant to Section 5.6(a) assign to the Department any right, title or interest to any collateral, security, or other right of recovery in connection with the Enrolled Loan. If such assignment has been made, the Department shall not be required to undertake any obligations of the Lender pursuant to Lender's loan documents, except for any obligations directly related to the exercise by the Department of its assigned rights of recovery in connection with the Enrolled Loan. The Lender shall provide the Department with all reasonable assistance thereafter as the Department may request in proceeding with respect to any such collateral, security or other right of recovery, except that such reasonable assistance shall not require the Lender to incur any out-of-pocket expenses. Any funds received by the Department as a result of enforcement actions taken with respect to any such collateral, security or other right of recovery shall be deposited by the Department in the Program Reserve Account up to the amount of the original Claim, less any out-of-pocket expenses incurred by the Department in taking the enforcement actions.
- (c) If the Department determines that it desires to exercise its right of subrogation in connection with an Enrolled Loan, and would be entitled to exercise such right except for the fact that the Lender's loss has not been fully covered, the Department, at its option, may pay, from funds in the Program Reserve Account, an amount sufficient to cover the Lender's loss, notwithstanding the fact that such payment may cover a principal amount not covered under the Program or not included in the Lender's Claim. Upon making such payment pursuant to this subsection, the Department shall be subrogated to the rights of the Lender in accordance with this Section.

Section 5.7. Non-Enrolled Loans to Borrowers. In the event that a Lender has outstanding (a) an Enrolled Loan with a Borrower and (b) other credit, including the unenrolled portion of an Enrolled loan, not

covered by the Program with the same Borrower, the Enrolled Loan shall be deemed to be subordinate to the other credit not covered by the Program.

Section 6.1 Monthly Program Reserve Account Statements Report. Lender shall provide to the Department a monthly statement for the Program Reserve Account. The monthly statement shall include the account balance, an itemized list of payments into the Program Reserve Account for the period covered by the statement, and the interest earned in the Program Reserve Account for the period covered by the statement. The monthly statement shall be delivered to the Department within thirty (30) days after the end of each month.

Section 6.2. Annual Summary Reports. On or before the 31th day of January following the end of each calendar annual, the Lender shall submit to the Department a report of all Enrolled Loans and the outstanding balances of such Enrolled Loans, including any amount from private sources, the current balance of the Program Reserve Account, charge-offs and recoveries on Enrolled Loans in the immediately preceding calendar year.

Section 6.3. Late Reporting. Performance reports are essential for the Department's effective administration of the Capital Access Loan Program and its incentive programs, generally. If Lender fails to submit any report required above and such breach continues uncured for more than thirty (30) days, the Department may recover, and Lender shall pay, as liquidated damages for the breach, an amount equal to \$500 for each month or part of a month the report(s) is past due.

Section 6.4. Forms. Reports required under this Article shall be substantially in the form(s) of **Exhibit 5** attached hereto.

Section 6.5. Information. The Lender shall provide the Department with the information regarding its participation in the Capital Access Loan Program as the Department may reasonably require.

Section 7.1. Term. This Agreement shall continue for a period of twenty-four (24) months after the effective date first set forth above unless terminated in accordance with the provision of this Section 8.1. Thereafter, this Agreement shall automatically be renewed for consecutive twelve- (12-) month terms unless at least thirty (30) days prior to the scheduled expiration date, either the Department or Lender notifies the other party in writing of its intention not to renew.

Section 7.2 Termination.

- (a) Subject to Section 8.1 (g) below, the Department may, in its sole discretion, terminate its obligations under this Agreement to enroll Eligible Loans under the Capital Access Loan Program. The termination shall be applicable on the effective date specified in the notice of termination, except that the termination shall not apply to any Eligible Loan which is made on or before the date on which the notice of termination is received by the Lender. However, if the Department is terminating the enrollment of Eligible Loans not merely for the Lender but instead for all participating lenders under the Capital Access Loan Program, the Department shall provide notice of at least ninety (90) days to the Lender. Any terminations under this Section shall be prospective only, and shall not apply to any Enrolled Loans existing prior to the date of any such termination by the Department, except that if a previously Enrolled Loan is refinanced, the amount covered under the Capital Access Loan Program shall not be increased beyond the covered amount of the previously Enrolled Loan.
- (b) If the Department has terminated its obligations under this Agreement in accordance with Section 8.1, the Department may withdraw the balance of the Program Reserve Account once there are no Enrolled Loans under the Capital Access Loan Program.
- (c) Notwithstanding the Department's termination of its obligation to enroll Eligible Loans under the Program, the Lender's obligation to submit reports pursuant to this Agreement shall continue as long as the Lender is pursuing recovery efforts with respect to Enrolled Loans.

- (d) The Director may terminate this Agreement as follows:
- i. Immediately upon delivery of written notice if Lender is no longer eligible to participate in the Capital Access Loan Program;
  - ii. Immediately upon delivery of written notice if Lender has not made a loan eligible for enrollment in the Capital Access Loan Program in the preceding twenty-four (24) month period;
  - iii. Immediately upon the termination of funding for the Capital Access loan Program; and
  - iv. Upon thirty (30) days written notice of failure by Lender to comply with the requirements of the Act or the provisions of this Agreement unless during such thirty-day period Lender cures such violation; *provided, however*, that such notice of termination shall be effective immediately if Lender's failure or breach is not susceptible of cure.
- (e) Notwithstanding Section 7.1 of this Agreement, Lender may cancel its participation in the Program at any time upon at least thirty (30) days written notice to the Department. Lender's notice of cancellation shall indicate the date after which capital access loans will not be made by Lender. Cancellation of Lender's participation in the Program shall not cause this Agreement to be terminated as to any Enrolled Loan then outstanding.
- (f) Upon the expiration or other termination of this Agreement, the Department shall cease to enroll loans made by Lender in the Capital Access Loan Program. Lender shall continue to hold the Program Reserve Account, subject to the Department's right to make withdrawals as provided in Section 5.3 of this Agreement, until all Enrolled Loans have either been repaid and Claims in respect of Enrolled Loans, if any, have been finally resolved. At such time as no Enrolled Loans and no Claims remain outstanding, Lender shall return to the Department the amount of moneys then held in the Program Reserve Account. Lender shall continue to submit all reports as required in this Agreement until the final disposition the Program Reserve Account.

Section 8. Pledge of the Program Reserve Account. The Department pledges the funds in the Program Reserve Account to be available to pay Claims pursuant to Section 5.4. The Department further pledges that the Lender shall have a first security interest in the funds in the Program Reserve Account to pay Claims pursuant to Section 5.4 and the Department will not encumber or pledge the funds to any other party. This pledge does not, however, diminish the ownership or control of the Program Reserve Account granted to the Department in Section 5.3, and it shall not affect the Department's right to withdraw funds from the Program Reserve Account pursuant to Section 5.3 of this Agreement.

Section 9.1. Public Records. Lender acknowledges that this Agreement and other records in the possession or control of the Department regarding the Capital Access Loan Program are public records under Section 149.43 of the O.R.C. and are open to public inspection unless a legal exemption applies. Lender's non-public financial information may be exempt from disclosure under a trade secret exception to the public records law.

Section 9.2. Trade Secrets. Ohio has adopted the Uniform Trade Secrets Act, which prohibits the disclosure of information determined to be a "trade secret" as defined in Section 1333.61(D) of the O.R.C. Any information submitted to the Department shall be considered public information and shall be released if requested unless such information is determined to be a "trade secret." Any information submitted to the Department which is considered by Lender to be a "trade secret" must be clearly marked as such. Every report, deliverable or other submission containing "trade secret" information must contain a page that lists each page in the submission where trade secret information appears and the number of occurrences of trade secret information on that page, identify each and every occurrence of the information within the submission

with an asterisk before and after each line containing the trade secret information and underline the trade secret information itself.

Section 9.3. Maintenance of Files. Lender shall maintain for at least three (3) years after the final Capital Access Loan Program loan subject to this Agreement is either repaid by the Borrower or written off by the Lender. Notwithstanding the foregoing, Lender shall maintain records for each Enrolled Loan for a period of three (3) years after it has been repaid or written off and records regarding the Program Reserve Account have been withdrawn and the account closed. In the event of a dispute, all records relevant to the dispute shall be maintained until the dispute is resolved.

Section 9.4. Inspection of Files. Upon notice to the Lender, the Department may inspect the files of the Lender relating to any loans enrolled under the Program, during normal business hours of the Lender. The Department will not copy or extract any information from such files unless (a) the information is eligible for protection from disclosure pursuant to applicable federal or state statutes, in which case the Department agrees to invoke the confidentiality provisions of the statute or (b) if such information cannot be protected, the consent of the Borrower has been obtained. Notwithstanding the foregoing, this Section is not intended to limit or preclude the ability of the Department to exercise its right of subrogation, to withdraw funds from the Program Reserve Account pursuant to Section 5.7 or to defend itself in any legal action commenced against the Department by the Lender or any Borrower.

Section 9.5. U.S. Treasury Inspector General. The Lender agrees to make available to the Inspector General for the United States Department of the Treasury all books and records related to Enrolled Loans, subject to the Right to Financial Privacy Act (12 U.S.C. § 3401 *et seq.*).

Section 9.6. External Audit. The Department may select an outside auditor to audit not more often than annually the Lender's files for loans and other documents under the Capital Access Loan Program. The Department shall be responsible for the expenses and costs of the outside auditor under this section. The Department shall use its best efforts to coordinate its audit of the Lender's files with other states' capital access programs in which the Lender participates, and, upon the Department's request therefore, the Lender shall provide a listing of the other state Capital Access Programs in which the Lender participates.

Section 9.7. Reports of Regulatory Agencies. The Lender consents to the transmittal to the Department, by any financial institutions regulatory agency of the federal or state governments, any information directly relating to the Lender's participation in the Program. To the extent permitted by law, the Department shall hold any information acquired pursuant to this Section confidential.

Section 10. Adherence to State and Federal Laws and Regulations.

- (a) Lender shall comply with all applicable federal, state, and local laws in the performance of Lender's obligations under this Agreement, as long as Lender has any obligation to the Department under this Agreement. Without limiting the generality of such obligation, Lender shall pay or cause to be paid all unemployment compensation, insurance premiums, workers' compensation premiums, income tax withholding, social security withhold, and any and all other taxes or payroll deductions required for all employees engaged by Lender in connection with the Capital Access Loan Program.
- (b) In accordance with Executive Order 2011-03K, Lender, by its signature on this document, certifies: (1) it has reviewed and understands Executive Order 2011-03K, (2) has reviewed and understands the Ohio ethics and conflict of interest laws including, without limitation, Ohio Revised Code §§ 102.01 *et seq.*, §§ 2921.01, 2921.42, 2921.421 and 2921.43, and §§ 3517.13(I) and (J), and (3) will take no action inconsistent with those laws and the order, as any of them may be amended or supplemented from time to time. Lender understands that failure to comply with the Ohio ethics and conflict of interest laws, is in itself, grounds for termination of this Agreement and the grant of funds made pursuant to this Agreement and may result in the loss of other contracts or grants with the State of Ohio.

- (c) No personnel of Lender, contractor of Lender or personnel of any such contractor, and no public official who exercises any functions or responsibilities in connection with the review or approval of any work completed under this Agreement, shall, prior to the completion of such work, voluntarily or involuntarily acquire any personal interest, direct or indirect, which is incompatible or in conflict with the discharge or fulfillment of his or her functions or responsibilities with respect to the completion of the work contemplated under this Agreement. Lender shall immediately disclose in writing to the Department any such person who, prior to or after the execution of this Agreement, acquires any personal interest, voluntarily or involuntarily. Lender shall cause any such person who, prior to or after the execution of this Agreement, acquires any personal interest, voluntarily or involuntarily, to immediately disclose such interest to the Department in writing. Thereafter, such person shall not participate in any action affecting the work under this Agreement unless the Department determines that, in light of the personal interest disclosed, his or her participation in any such action would not be contrary to the public interest.
- (d) Lender represents and warrants to the Department that Lender does not owe: (1) any delinquent taxes to the State of Ohio or a political subdivision of the State of Ohio; (2) any moneys to the State of Ohio or a state agency for the administration or enforcement of any environmental laws of the State of Ohio; and (3) any other moneys to the State of Ohio, a state agency or a political subdivision of the State of Ohio that are past due, whether or not the amounts owed are being contested in a court of law.
- (e) Lender represents and warrants to the Department that Lender has made no false statements to the Department or any of its employees or agents in the process of obtaining this Agreement. Lender acknowledges that any person who knowingly makes a false statement to obtain an award of financial assistance may be required under Ohio Revised Code § 9.66(C) to repay such financial assistance and shall ineligible for any future economic development assistance from the State of Ohio, any state agency or a political subdivision. In addition, any person who provides a false statement to secure economic development assistance may be guilty of falsification, a misdemeanor of the first degree, pursuant to Ohio Revised Code § 2921.13(F)(1).
- (f) If applicable, Lender must certify compliance with Section 2909.33 of the O.R.C., the Declaration Regarding Material Assistance/Non-assistance to a Terrorist Organization.

Section 11. Notices. All notices, certificates, requests or other communications shall be deemed given when delivered by messenger, by professional courier service or by registered or certified mail postage prepaid, return receipt requested, addressed as follows:

If to the Department: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

If to the Lender: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Section 12.1. Governing Law. This Agreement shall be governed by the laws of the State of Ohio as to all matters, including but not limited to matters of validity, construction, effect and performance.

Section 12.2. Forum and Venue. Lender irrevocably submits to the non-exclusive jurisdiction of any federal or state court sitting in Columbus, Ohio, in any action or proceeding arising out of or related to this

Agreement, Lender agrees that all claims in respect of such action or proceeding may be heard and determined in any such court, and Lender irrevocably waives any objection it may now or hereafter have as to the venue of any such action or proceeding brought in such court or that such court is an inconvenient forum. Nothing in this Agreement shall limit the right of the Department to bring any action or proceedings against Lender in the courts of any other jurisdiction. Any actions or proceedings by Lender against the Department or the State of Ohio involving, directly or indirectly, any matter in any way arising out of or related to this Agreement shall be brought only in a court in Columbus, Ohio.

Section 12.3. Entire Agreement. This Agreement, including its exhibits and documents incorporated into it by reference, constitutes the entire agreement and understanding of the parties with respect to its subject matter. Any prior written or verbal agreement, understanding or representation between the parties or any of their respective officers, agents, or employees is superseded and no such prior agreement, understanding or representation shall be deemed to affect or modify any of the terms or conditions of this Agreement.

Section 12.4. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions of this Agreement.

Section 12.5. Amendments. Except as otherwise provided in Section 4.4, this Agreement may not be amended or modified except upon such terms as both parties may agree in a writing executed by authorized representatives of each party.

Section 12.6. Forbearance Not a Waiver. No act of forbearance or failure to insist on the prompt performance by Lender of its obligations under this Agreement, either express or implied, shall be construed as a waiver by the Department of any of its rights under this Agreement or applicable law.

Section 12.7. Pronouns. The use of any gender pronoun shall be deemed to include the other gender, and the use of any singular noun or verb shall be deemed to include the plural, and vice versa, whenever the context so requires.

Section 12.8. Headings. Section headings contained in this Agreement are inserted for convenience only and shall not be used in construing this Agreement.

Section 12.9. Assignment. Neither this Agreement nor any rights, duties, or obligations of Lender pursuant to this Agreement shall be assigned by Lender without the prior express written consent of the Department, which shall not be unreasonably withheld. Any purported assignment not made in accordance with this paragraph shall be void.

Section 12.10. Limitation of Rights. This Agreement shall be for the exclusive benefit of the Lender and the Department, and shall not be construed to give any other person any legal or equitable right, remedy or claim with respect to the Agreement.

Section 12.11. No Personal Liability. No member, officer or employee of the Department, including any person executing this Agreement, shall be liable personally under this Agreement or subject to any personal liability for any reason relating to the execution of this Agreement or the Capital Access Loan Program.

Section 12.12. Binding Effect. Each and all of the terms and conditions of this Agreement shall extend to and bind and inure to the benefit of Lender, its successors and permitted assigns.

Section 12.13. Survival. Any provision of this Agreement which, by its nature, is intended to survive the expiration or other termination of this Agreement, including, without limitation, any indemnification obligation, shall so survive and shall benefit the parties and their respective successors and permitted assigns.

**Signature:** Each of the parties has caused this Agreement to be executed by its authorized representatives as of the dates set forth below their respective signatures effective as of the Effective Date:

**Ohio Department of Development**

Christiane Schmenk  
Director

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

**[Lender]**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

List of Exhibits:

- Exhibit 1 – Loan Enrollment and Certification – Borrower’s Information Form
- Exhibit 2 - Lender’s Loan Enrollment and Certification Form
- Exhibit 3 – Pre-Approval Form for Participating Ohio Capital Access Program Lenders
- Exhibit 4 – Claim Form
- Exhibit 5 - Ohio Capital Access Loan Program Annual Report Template

**EXHIBIT 1**

**OHIO CAPITAL ACCESS PROGRAM (OCAP)  
Loan Enrollment and Certification  
Borrower's Information Form**



**Department of  
Development**

**Borrower's Information** *(Form to be completed by the Borrower and submitted to Lender)*

Contact Name:			Contact Title:		
Company Name:			E-mail Address:		
Address:			Phone #:		
City:	State:	Zip:	County:		
NAICS Code:	Fed. Tax ID#:	SIC Code:	EIN:		
The Company is: <input type="checkbox"/> For-Profit <input type="checkbox"/> Nonprofit			Type of Business:		
Revenues in the Last Fiscal Year:			Revenues Currently:		
Year Started:			Year Incorporated:		
Is the Borrower a minority- or woman-owned business? <input type="checkbox"/> Yes <input type="checkbox"/> No					
If yes, which category?		<input type="checkbox"/> African American	<input type="checkbox"/> Hispanic	<input type="checkbox"/> Native American	
		<input type="checkbox"/> Asian American	<input type="checkbox"/> Woman		
Is the Borrower a certified Minority Business Enterprise with the State of Ohio? <input type="checkbox"/> Yes <input type="checkbox"/> No					

Note: Information given with respect to Borrower's location and ethnicity will not be used to determine program eligibility.

Current # of Full-Time Employees:		Current # of Part-Time Employees:	
# Full-time jobs to be created in 1 yr:		# Part-time jobs to be created in 1 yr:	
# Full-time jobs to be created in 3 yrs:		# Part-time jobs to be created in 3 yrs:	
# Full-time jobs to be retained:		# Part-time jobs to be retained:	
Average Hourly wage for Full-time:		Average Hourly wage for Part-time:	

Note: Full-Time is more than 2000 hours per year;  
Part-Time is less than 2000 hours per year;  
Created jobs cannot be transfers from another facility in Ohio;  
Retained jobs are employees who will be layed-off if the Lender loan is not received.

**Use of Lender Loan Proceeds** (check all that apply):

<input type="checkbox"/> Purchase Real Estate	<input type="checkbox"/> Refinance Business Debt
<input type="checkbox"/> Purchase Office Equipment	<input type="checkbox"/> Payroll
<input type="checkbox"/> Purchase Inventory	<input type="checkbox"/> Line of credit
<input type="checkbox"/> Purchase Machinery	<input type="checkbox"/> Other <i>(Provide Brief Explanation)</i>

**Borrower's Certification and Acknowledgement**

Borrower Certifies and Acknowledges that:

1. The loan proceeds will be used for a "business purpose." A business purpose includes, but is not limited to, start-up costs, working capital, business procurement, franchise fees, equipment, inventory, as well as the purchase, construction, renovation, or tenant improvements of an eligible place of business that is not for passive real estate investment purposes. The definition of business purpose excludes activities that relate to acquiring or holding passive investments such as commercial real estate ownership, the purchase of securities, and lobbying activities as defined in Section 3 (7) of the Lobbying Disclosure Act of 1995, P.L. 104-65, as amended.
2. The loan proceeds will not be used to:
  - a. repay delinquent federal or state income taxes unless the Borrower has a payment plan in place with the relevant taxing authority;
  - b. repay taxes held in trust or escrow (e.g. payroll or sales taxes);
  - c. reimburse funds owed to any owner, including any equity injection or injection of capital for the business' continuance; or
  - d. purchase any portion of the ownership interest of any owner of the business.

(Over)

3. The Borrower is not:
  - a. an executive officer, director, or principal shareholder of the financial institution lender;
  - b. a member of the immediate family of an executive officer, director, or principal shareholder of the financial institution lenders;<sup>1</sup> or
  - c. a related interest of such executive officer, director, principal shareholder, or member of the immediate family.
4. The Borrower is not:
  - a. a business engaged in speculative activities that develop profits from fluctuations in price rather than through normal course of trade, such as wildcatting for oil and dealing in commodities futures, unless those activities are incidental to the regular activities of the business and part of a legitimate risk management strategy to guard against price fluctuations related to regular activities;
  - b. a business that earns more than half of its annual net revenue from lending activities; unless the business is a non-bank or non-bank holding company certified as a Community Development Financial Institution;
  - c. a business engaged in pyramid sales, where a participant's primary incentive is based on the sales made by an ever-increasing number of participants;
  - d. a business engaged in activities that are prohibited by federal law or applicable law in the jurisdiction where the business is located or conducted. (Included in these activities is the production, servicing, or distribution of otherwise legal products that are to be used in connection with an illegal activity, such as selling drug paraphernalia or operating a motel that knowingly permits illegal prostitution); or
  - e. a business engaged in gambling enterprises, unless the business earns less than 33 percent of its annual net revenue from lottery sales.
5. No principal of the borrowing entity has been convicted of a sex offense against a minor (as such terms are defined in section 111 of the Sex Offender Registration and Notification Act (42 U.S.C. 16911)).<sup>2</sup>
6. The Borrower has not been issued Unresolved Finding for Recovery by the Auditor of the State of Ohio.
7. The Borrower is aware that it has been offered a loan by the Lender which will be enrolled in the Ohio Capital Access Program. The purpose of the Ohio Capital Access Program is to assist a Lender in making loans to Borrowers that otherwise might not qualify for such loans. The program utilizes a special Program Reserve Account to assist the Lender in covering losses from a portfolio of loans that the Lender makes under the program. The Borrower pays a non-refundable fee between 1.5 - 3 percent of the loan amount into the Program Reserve Account, which the Lender matches. The Ohio Department of Development also contributes a pre-determined percentage of the loan amount into the Program Reserve Account.
 

The Ohio Department of Development is not a party to the loan and plays no role in the Lender's decision regarding whether or not to make the loan, or in the setting of the interest rate, fees, duration, or any other terms or conditions of the loan. The Lender's rights and remedies are delineated in the loan agreement between itself and the Borrower and in laws applicable to any financing. The Ohio Department of Development is not involved in any decision by the Lender with respect to enforcing the Lender's rights under the loan agreement. However, the Ohio Department of Development has rights of subrogation. In the event a claim is made by the Lender on a defaulted loan enrolled in the Capital Access Program, the Ohio Department of Development may exercise its rights to continue collection efforts.
8. This form and its information will be provided to the Ohio Department of Development. This form and its supporting loan documentation may also be provided to the U.S. Department of Treasury Inspector General, subject to the U.S. Right to Financial Privacy Act (12 U.S.C. 563401 et seq.) and borrower grants lender permission to provide the loan documentation.
9. The Ohio Department of Development may contact the Borrower to determine the status of its projected employment numbers.

Authorized Signature \_\_\_\_\_ Date \_\_\_\_\_

Printed Name and Title \_\_\_\_\_

**Attention Lenders**

Email form to: OCAP@development.ohio.gov

- or -

Mail form to: Manager, Office of Minority Financial Incentives,  
Ohio Department of Development  
77 S. High Street, 24<sup>th</sup> Floor, P.O. Box 1001, Columbus, Ohio 43216-1001  
or fax form to: (614) 466-4172  
For information, please call (800) 848-1300 ext. 65700

The State of Ohio is an Equal Opportunity Employer and Provider of ADA Services.

<sup>1</sup> The terms "executive officer," "director," "principal shareholder," "immediate family," and "related interest" refer to the same relationship to a financial institution lender as the relationship described in part 215 of title 12 of the Code of Federal Regulations, or any successor to such part.

<sup>2</sup> For the purposes of this certification, "principal" is defined as "if a sole proprietorship, the proprietor; if a partnership, each managing partner and each partner who is a natural person and holds a 20 percent or more ownership interest in the partnership; and if a corporation, limited liability company, association or a development company, each director, each of the five most highly compensated executives or officers of the entity, and each natural person who is a direct or indirect holder of 20 percent or more of the ownership stock or stock equivalent of the entity."

**EXHIBIT 2**

**OHIO CAPITAL ACCESS PROGRAM (OCAP)**  
**Lender's Loan Enrollment and Certification Form**



**Department of  
 Development**

**Lender Information** *(Form to be completed by the Lender and submitted to the Ohio Department of Development)*

Bank Name:		OCAP Reserve Fund Account #:	
Contact Name:		Contact Title:	
Phone #:		Email Address:	
Address:		Fax:	
City:	State:	Zip:	EIN:

**Loan Information**

Borrower Name:	Lender Loan #:
Loan Proceeds Disbursement Date:	Loan Agreement Date:
Line of Credit Amount (if applicable):	Line of Credit Amount to be Enrolled in OCAP:
Term Loan Amount (if applicable):	Term Loan Amount to Be Enrolled in OCAP:
Other Loan Type (if applicable):	Other Loan Amount to Be Enrolled in OCAP:
Total Amount of Loans:	Total Amount to be Enrolled in OCAP:

**Important:** Lender has 15 business days from either the Loan Agreement Date or Disbursement Date to submit OCAP Loan Enrollment and Certification Form. Loan amount should only be greater than amount enrolled if Borrower financed the Reserve Fund Contribution Fee.

Length of Line of Credit:	mos.	Length of Term Loan:	mos.	Length of Other Loan Type:	mos.
Interest Rate:	Please Describe Use of Loan Proceeds:				
Amount of Other Credit Facilities being Provided in Combination with this OCAP Enrollment: \$					
Amount of Other Public Financing being Provided in Combination with this OCAP Enrollment: \$					
Amount of Equity being Provided in Combination with this OCAP Enrollment: \$					

**Refinancing Existing Debt**

*(Complete only if Refinancing Existing Debt from another Financial Institution)*

Debt from Another Financial Institution: <input type="checkbox"/> Yes <input type="checkbox"/> No	Financial Institution's Loan #:
Financial Institution Name:	Type of Existing Debt:

**Important:** Financial Institution is defined as any bank, trust company, savings bank, credit union or savings and loan association that is chartered by and has a significant presence in the state, or any national bank, federal savings and loan association, or federal savings bank that has a significant presence in the state.

**Refinancing an Existing OCAP Debt**

*(Complete only if refinancing an existing OCAP loan with Lender)*

Lender's Previous Loan Number:	
New OCAP Covered Loan Amount (a): \$	Previous OCAP Covered Loan Amount (b): \$
Increased OCAP Covered Loan Amount (a - b): \$	

(Over)

**Eligibility Criteria**

Does the Borrower meet the following OCAP eligibility criteria?

The Borrower has annual revenues of under \$10 million: <input type="checkbox"/> True <input type="checkbox"/> False		The Borrower's principal place of business is in Ohio: <input type="checkbox"/> True <input type="checkbox"/> False	
The Loan is not for residential housing development: <input type="checkbox"/> True <input type="checkbox"/> False			
The Loan is not for passive or speculative real estate investment/ownership: <input type="checkbox"/> True <input type="checkbox"/> False			
# Full-time jobs to be created in 1 yr:		# Part-time jobs to be created in 1 yr:	
# Full-time jobs to be created in 3 yrs:		# Part-time jobs to be created in 3 yrs:	
# Full-time jobs to be retained:		# Part-time jobs to be retained:	
Borrower is not on the Auditors Findings for Recovery List?: <input type="checkbox"/> True <input type="checkbox"/> False <i>(check list at <a href="http://www.auditor.state.oh.us/resources/findings">www.auditor.state.oh.us/resources/findings</a>)</i>			
Borrower has signed the OCAP Loan Enrollment and Certification Borrower's Information Form and based on the Lender's knowledge the Lender has no reason to believe the certifications and representations in it are not true: <input type="checkbox"/> True <input type="checkbox"/> False			

**Important:** Answers marked False makes the loan ineligible for the OCAP. There must be at least one Full-Time Equivalent job created or retained to make the loan eligible for OCAP.

**Reserve Fund Contribution (Calculated on Amount to be Enrolled)**

Borrower Contribution: \$ _____ %	Lender Contribution: \$ _____ %
Borrower's contribution must be between 1.5 - 3 percent	Lender's contribution must match Borrower's contribution
OCAP Contribution (Bank): \$ _____ 10%	OCAP Contribution on Lenders 1st, 2nd or 3rd OCAP: \$ _____ 50%
OCAP Contribution if Borrower is a MBE certified by the State of Ohio: \$ _____	_____ 80%

**Lender's Certification and Acknowledgement**

Lender Certifies and Acknowledges that:

- The loan has not been made in order to place under the protection of the OCAP prior debt that is not covered under the OCAP, and that is or was owed by the Borrower to the financial institution Lender or to an affiliate of the financial institution Lender.
- The loan is not a refinancing of a loan previously made to that Borrower by the financial institution Lender, or any affiliate of the financial institution Lender.
- No principal of the financial institution Lender has been convicted of a sex offense against a minor (as such terms are defined in section 111 of the Sex Offender Registration and Notification Act (42 U.S.C. 16911)). For the purposes of this certification, principals is defined as if a sole proprietorship, the proprietor; if a partnership, each partner, who is a natural person that holds a 20 percent or more ownership; if a corporation, limited liability company, association or a development company, each director, each of the five most highly compensated executives, officers, or employees of the entity, and each natural person who is a direct or indirect holder of 20 percent or more of the ownership stock or stock equivalent of the entity.
- The Lender has not made the loan to cover the unguaranteed portion of a U.S. Small Business Administration (SBA) loan, or, to its knowledge, to cover the unguaranteed portion of a loan guaranteed by any other federal, state, local government, or public entity.
- The Lender will not make the loan to cover the unguaranteed portion of a U.S. Small Business Administration loan or the unguaranteed portion of a loan guaranteed by any other federal, state, or local government entity.
- The Lender has disclosed to the Borrower information concerning the OCAP as set forth in the OCAP Loan Enrollment and Certification Borrower Information Form. The Lender has provided to the Borrower any required privacy notices required by Lender's policies and has processed the OCAP loan in accordance with the Lender's customer identification program or other similar policies and procedures.
- To the best of his/her knowledge, all information provided on this enrollment form is true and correct; and the representations made in the Ohio Capital Access Program Participation Agreement remain true. **Please attach evidence of Borrower and Lender's Reserve Fund Contribution deposit.**

Authorized Signature \_\_\_\_\_ Date \_\_\_\_\_

Printed Name and Title \_\_\_\_\_

**Attention Lenders**

Email form to: [OCAP@development.ohio.gov](mailto:OCAP@development.ohio.gov)  
 - or  
 Mail form to: Manager, Office of Minority Financial Incentives,  
 Ohio Department of Development  
 77 S. High Street, 24<sup>th</sup> Floor, P.O. Box 1001, Columbus, Ohio 43216-1001  
 or fax form to: (614) 466-4172  
 For information, please call (800) 848-1300 ext. 65700

The State of Ohio is an Equal Opportunity Employer and Provider of ADA Services.

**EXHIBIT 3**

**OHIO CAPITAL ACCESS PROGRAM (OCAP)  
Pre-Approval Form for Participating  
Ohio Capital Access Program Lenders**



**Department of  
Development**

The Ohio Capital Access Program Pre-Approval Form is for participating Ohio Capital Access Program Lenders (OCAP Lenders) considering enrolling a loan into the Ohio Capital Access Program. OCAP Lenders should complete the form and send it to [OCAP@development.ohio.gov](mailto:OCAP@development.ohio.gov). If pre-approved, the OCAP Lender will receive confirmation of the pre-approval via e-mail. Once the pre-approved loan has closed, the Lender must send 1) the OCAP Loan Enrollment and Certification Form Lender Information; 2) the OCAP Loan Enrollment and Certification Form Borrower's Information; and 3) a copy of the proof of contribution deposit to the Ohio Department of Development. All enrollment forms should be e-mailed or faxed to the address on the bottom of this form within 15 business days of the loan agreement or initial disbursement date.

**1. OCAP Lender Information:**

Bank Name:	Contact/Title:	
Address:		
City:	State:	Zip:
Phone:	Fax:	
E-mail:		

**2. Borrower's Information:**

Borrower's Name:	Contact/Title:	
Address:		
City:	State:	Zip:
Phone:	Fax:	
E-mail:		
Industry:		

**3. Loan Information**

Term Loan Amount: \$	Line of Credit Amount: \$
Anticipated Closing Date:	
Please describe what the loan will be used for:	

OCAP Reserve Fund Contribution : \_\_\_\_\_ 10% \_\_\_\_\_ 50% \_\_\_\_\_ 80%  
*(80 percent is only for state certified minority business. Please visit [www.das.ohio.gov/eod](http://www.das.ohio.gov/eod) to search for borrower in the certified minority business provider database.)*

Refinancing an Existing Loan?  Yes  No *(If no, skip to Section 4)*

\*Refinancing a Loan from another Financial Institution: \_\_\_\_\_  
*\*A financial institution is defined as any bank, trust company, savings bank, or savings and loan association that is chartered by and has a significant presence in the state, or any national bank, federal savings and loan association, or federal savings bank that has a significant presence in the state.*

Financial Institution's Loan Number: \_\_\_\_\_

Is this new debt on an Existing OCAP Lender Loan?  Yes  No

**Refinancing an Existing OCAP Loan:**

OCAP Lender's Previous Loan Number:
New total OCAP covered Loan Amount: \$
Less: Previous OCAP Covered Loan Amount: \$
Increased OCAP Covered Loan Amount: \$

#### 4. Criteria

Does Borrower or Loan Meet the Following Criteria?

The Borrower has Annual Revenues of less than \$10 million: <input type="checkbox"/> True <input type="checkbox"/> False
The Borrower's Principal Place of Business is in Ohio: <input type="checkbox"/> True <input type="checkbox"/> False
The Loan is not being used for Residential Housing Purchase, Construction, or Development: <input type="checkbox"/> True <input type="checkbox"/> False
The Loan is not being used for Passive Real Estate Ownership: <input type="checkbox"/> True <input type="checkbox"/> False
Number of jobs to be created: _____ for Line of Credit _____ for Term Loan
Number of jobs retained: _____ for Line of Credit _____ for Term Loan
The Borrower is able to make the certifications and acknowledgments on the OCAP Loan Enrollment and Certification Borrower's Information Form: <input type="checkbox"/> True <input type="checkbox"/> False
The Borrower is not in the Ohio Auditor's Finding for Recovery Database: <input type="checkbox"/> True <input type="checkbox"/> False (Visit <a href="http://www.auditor.state.oh.us/resources/findings">www.auditor.state.oh.us/resources/findings</a> to view the Finding for Recovery Database).

(If any of the answers above are false, the loan is not eligible.)

#### Reminders for OCAP Lenders

1. **OCAP Lender has 15 business days from the date of the loan agreement (if loan is a term loan) or 15 business days from date of first loan disbursement (if loan is a line of credit) to enroll the loan in the OCAP.**
2. **Enrolling Two Loans Simultaneously:** OCAP Lender may enroll a term loan and a line of credit (or working capital loan) on the same enrollment form. When doing so, make sure the jobs that are being created and/or retained are split between the two loans. For example: the borrower expects to create nine jobs; if they are obtaining a line of credit and a term loan, the jobs to be created for the line of credit will be five and the jobs to be created for the term loan will be four. Doing this will avoid the double counting of jobs.
3. **Enrolling Partial Loans:** Partial loan enrollments will not be accepted. On the loan enrollment form the only difference between the amount enrolled in the program and the loan amount would be the contribution fee financed by the borrower. The only exception to this policy is when a OCAP Lender is adding new increased debt to an existing loan. In this case, the increased portion can be enrolled in the OCAP. The existing loan plus the new debt should not exceed the maximum OCAP loan limits of \$250,000 for working capital and \$350,000 for fixed assets.
4. **Enrolling Multiple Loans to One Company:** If a company has had previous loans enrolled with the OCAP, the OCAP Lender may enroll an additional loan. To do so, the company must have created or retained the jobs indicated on the previous enrollment form(s). Jobs created or retained on the new loan enrollment form should not be the same jobs indicated on the previous loan enrollment form(s).
5. **Working Capital/Lines of Credit:** Lines of credit or short/intermediate term working capital loans are eligible for the program if the funds are being used for the day-to-day operations of the business or to purchase limited useful life assets. Lines of credit are only enrolled in the program for 36 months. After 36 months, re-enrollment must take place.
6. **Refinancing:** Refinancing of lines of credit or short/intermediate term working capital loans are eligible for the program if the refinancing is a loan from another financial institution or an existing OCAP loan at the OCAP Lender. The maximum amount of the line of credit or short/intermediate term working capital refinanced loan is \$250,000. Refinancing of long-term debt is eligible. The refinanced loan has a maximum of \$500,000 and should be associated with refinancing of a fixed asset(s).
7. **Full-Time Equivalents (FTE):** Full-Time is more than 2,000 hours per year.

#### Attention Lenders

Email form to: [OCAP@development.ohio.gov](mailto:OCAP@development.ohio.gov)

- or -

Mail form to: Manager, Office of Minority Financial Incentives,  
Ohio Department of Development  
77 S. High Street, 24<sup>th</sup> Floor, P.O. Box 1001, Columbus, Ohio 43216-1001  
or fax form to: (614) 466-4172  
For information, please call (800) 848-1300 ext. 65700

The State of Ohio is an Equal Opportunity Employer and Provider of ADA Services.

**EXHIBIT 4**

**OHIO CAPITAL ACCESS PROGRAM (OCAP)  
Claim Form**



**Department of  
Development**

**1) Lender Information**

Reserve Fund Account Number:		Name:	
Contact Name:		Contact Title:	
E-mail Address:		Fax:	
Address:		Phone :	
City:	State:	Zip:	County:

**2) Loan Information**

Loan Number:	Borrower's Name:
Date of Determination of Uncollectability (must be within 120 days of claim submission):	
Amount of Claim (must not exceed original loan amount enrolled):	
a) Principal: \$	
b) Accrued Interest: \$	
Total Claim Amount (a+b): \$	

**3) Remedies**

The Lender has pursued all remedies on this defaulted loan through legal proceedings, seizure, and liquidation of collateral, guarantee, and/or other methods.  
(documentation supporting this affirmation is attached)

Note: If in the future Lender recovers any amount covered by this claim, the Lender must promptly deposit the amount back into the program reserve account, minus reasonable collection expenses.

**4) Attachments**

The Lender must attach the following:

1. event log detailing collection efforts
2. a copy of the note
3. security documents
4. bankruptcy discharge (if applicable)
5. evidence of final judgement entry
6. settlement statement for sale of business or collateral
7. loan transaction history
8. evidence of enforcement of personal and/or corporate guarantee
9. evidence of the disposition of collateral
10. signed cover letter stating that all legal remedies have been pursued and no other collection efforts are taking place

**5) Certification**

By signing below the authorized person acknowledges that, to the best of his/her knowledge, all information provided on and with this form is true.

Authorized Signature \_\_\_\_\_ Date \_\_\_\_\_

Printed Name and Title \_\_\_\_\_

**Attention Lenders**

Email form to: OCAP@development.ohio.gov

- or -

Mail form to: Manager, Office of Minority Financial Incentives,  
Ohio Department of Development  
77 S. High Street, 24<sup>th</sup> Floor, P.O. Box 1001, Columbus, Ohio 43216-1001  
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