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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

June 22, 2000

**Interpretive Letter #895  
October 2000  
12 USC 84c3  
12 CFR 32.3(b)(1)(iv)(B)**

Subject: Lending Limits/Warehouse Receipts/12 C.F.R. § 32.3(b)(1)(iv)(B)

Dear [ ]:

This is in reference to our several recent telephone conversations regarding an issue raised in a letter originally submitted to Kit G. Sugiyama, Assistant Deputy Comptroller of the OCC's Denver Field Office, by your predecessor, [ ], former president of the [ ], [ *City, State* ] ("Bank"). [ ] noted in his letter that he planned to retire shortly and that all correspondence should be directed to you.

[ ]'s letter requested that the OCC clarify a provision in its lending limit regulation issued pursuant to 12 U.S.C. § 84. His inquiry focused on the lending limitations applicable to grain warehouse receipt transactions under 12 C.F.R. § 32.3(b)(1)(iv)(B). He asked what conditions must be satisfied in order for the Bank to take advantage of the special lending limits available under that provision.

**Statute**

All loans and extensions of credit made by national banks are subject to statutory legal lending limits. Generally, the total loans and extensions of credit to any one borrower may not exceed 15 percent of the bank's total unimpaired capital and unimpaired surplus. 12 U.S.C. § 84(a). The statute "is intended to prevent one individual, or a relatively small group, from borrowing an unduly large amount of the bank's deposits for the use of the particular enterprises in which they are engaged." OCC Interpretive Letter No. 15 (January 10, 1978) *reprinted in* [Transfer Binder 1978-79] Fed. Banking L. Rep. (CCH) ¶ 85,090. OCC regulations promulgated pursuant to section 84 describe the purposes of the lending limits as "protect[ing] the safety and soundness of national banks by preventing excessive loans to one person, or to related persons that are financially dependent, and [promoting] diversification of loans and equitable access to banking services." 12 C.F.R. § 32.1(b).

The statute provides that these general lending limits are subject to certain exceptions. Under 12 U.S.C. § 84(c)(3), loans and extensions of credit “secured by bills of lading, warehouse receipts, or similar documents transferring or securing title to readily marketable staples” are subject to a lending limit of 35 percent of capital and surplus in addition to the general limits if the market value of the staples securing each loan or extension of credit at all times equals or exceeds 115 percent of the outstanding loan or credit balance. In addition, the staples must be fully covered by insurance “whenever it is customary to insure such staples.” In instances where this additional lending limit is available, a bank might therefore have up to 50 percent of its capital and surplus outstanding to one borrower.

## **OCC Regulation**

The OCC’s regulation implementing the statutory lending limits is found at 12 C.F.R. Part 32. In 12 C.F.R. § 32.3(b)(1), the OCC provides guidance and specifies certain requirements, pursuant to 12 U.S.C. § 84(c)(3), for those circumstances where a national bank qualifies for increased lending limits for loans secured by shipping documents and warehouse receipts covering readily marketable staples. Subsection (iv) of that section, 12 C.F.R. § 32.3(b)(1)(iv), provides, in pertinent part:

The holder of the warehouse receipts, order bills of lading, documents qualifying as documents of title under the Uniform Commercial Code, or other similar documents, must have control and be able to obtain immediate possession of the staple so that the bank is able to sell the underlying staples and promptly transfer title and possession to a purchaser if default should occur on a loan secured by such documents....

The Bank’s inquiry focuses on 12 C.F.R. § 32.3(b)(1)(iv)(B), which provides that:

Warehouse receipts issued by the borrower-owner that is a grain elevator or warehouse company, duly-bonded and licensed and regularly inspected by state or Federal authorities, may be considered eligible collateral under this provision only when the receipts are registered with an independent registrar whose consent is required before the staples may be withdrawn from the warehouse.

## **Discussion**

The Bank has a loan customer who is in the business of operating a grain elevator and warehouse (“Customer”). The Customer is bonded and inspected by appropriate federal authorities. At present, the Bank maintains the stricter lending limits of 12 U.S.C. § 84(a) with respect to this credit, participating out to another lender any loan portion that would exceed those limits. The Bank would derive increased income if it could take advantage of the higher lending limits allowed in 12 U.S.C. § 84(c)(3) and 12 C.F.R. § 32.3(b)(1). The Bank has therefore asked whether the requirements of 12 C.F.R. § 32.3(b)(1)(iv)(B) would be satisfied if the Customer registered the relevant warehouse receipts with a trustworthy and independent third party, who would in no way be affiliated with or under the control or influence of the Customer, and whose

consent would be required before the staples could be withdrawn from the Customer's warehouse.

Such an arrangement would not be sufficient to satisfy the requirements of the OCC's regulation as long as the staples themselves remained in storage in the Customer's warehouse or elevator. The special lending limits of 12 C.F.R. § 32.3(b)(1) are only available when all requirements of the regulation are satisfied. Your proposal for registration of warehouse receipts with a trustworthy and independent third party, intended to comply with the requirements of subsection (b)(1)(iv)(B), does not address and would not be sufficient to comply with section (b)(1)(iv), which requires that the holder of the receipts "must have *control* and be able to obtain immediate possession of the staple..." (emphasis added). The third party custodian you describe would hold the warehouse receipts but would not have control of the underlying staples, which would remain in the possession and under the control of the borrower Customer.

The important characteristic of warehouse receipts and order bills of lading is that the holder of such a document has control of the commodity pledged to secure the loan and can obtain immediate possession. In the event of default on a loan secured by such documents, the bank would be in a position to sell the underlying commodity and promptly transfer title and possession to the purchaser, thus being able to protect itself without extended litigation. This exception to the legal lending limits is therefore based on the assumption that the warehouse receipt is issued by a person who has no interest in the commodity he or she is holding and would have no reason to deny delivery of those goods upon presentation of the receipts. This is not the case where the issuer of the receipts is also the owner and possessor of the goods. In such an instance, the borrower would be put in the position of acting as the bailee of the collateral for his own loan. Should his own interests later prompt him to deny delivery of the goods upon presentment, it would be inadequate protection to the bank to have the receipts themselves held by a third party, no matter how independent and trustworthy the latter.

The primary situation contemplated by 12 C.F.R. § 32.3(b)(1)(iv) is that where the borrower is the farmer/grower of the crop. In that instance, the borrower consigns the staples to the control and custody of a grain elevator or warehouse, who issues receipts which are held by the lending bank or its agent. The regulatory requirements for the increased lending limits of 12 U.S.C. § 84(c)(3) are satisfied because the bank may obtain delivery of the goods from the warehouse by presenting the receipts if circumstances make it necessary.

However, where the borrower is the grain elevator or warehouse company itself, a conflict of interest arises. Accordingly, the regulation imposes additional, rather than alternate, requirements to ensure the protection of the collateral. In order to take advantage of the special lending limits of 12 U.S.C. § 84(c)(3), it is still necessary to comply with the requirement of 12 C.F.R. § 32.3(b)(1)(iv) that the holder of the warehouse receipts be in a position to control the staples and able to deliver them to the lending bank on presentation of those receipts. While subsection (b)(1)(iv)(B) provides that the receipts in such a situation must be held by an independent third party, it does not obviate the control requirement.

The OCC has considered this issue before. In 1975, the OCC stated that the special lending limits under the predecessor regulation to 12 C.F.R. § 32.3(b)(1)<sup>1</sup> were available in a situation where a third party company, acting as agent/trustee for the lending bank, held the warehouse receipts issued by the borrower/grain elevator AND kept a bonded agent at the grain elevator at all times to ensure control of the collateral.<sup>2</sup> By contrast, the OCC in 1973 explicitly rejected as adequate compliance with the same regulation an arrangement whereby the borrower/grain elevator would register the receipts with a third party but retain control of the underlying staples. In that letter, the OCC stated its concern

about the legal status of warehouse receipts issued by a warehouseman to himself as owner of grain stored in his own warehouse, which are used as collateral for a loan to the warehouseman by a national bank. In the event of default on such a loan, the bank would be placed in the position of foreclosing on the collateral which has remained in the hands of the borrower. The relationship is therefore the same as that existing in any usual borrowing transaction for which the law makes no special exception.<sup>3</sup>

Where the borrower is the grain elevator or warehouse, the requirement that the staples be in the control of an independent party who is able to deliver them to the lending bank on presentation of the receipts may be satisfied in various ways. In the 1975 letter cited above (n. 2, *supra*), the grain remained in the elevator owned by the borrower, but the third party company holding the receipts also maintained an agent on the premises. Another possibility would be for the borrower/warehouse owner to consign the staples to the custody and control of a second, unaffiliated warehouse. The OCC will consider other alternatives that are designed to fulfill the goal of protecting the collateral in order to safeguard the lending bank's exposure.

[ ]'s letter focused primarily on what documentation would be necessary to satisfy the requirement for an "independent registrar" in 12 C.F.R. § 32.3(b)(1)(iv)(B), and included a draft contract that he suggested the OCC might review. He did not address the issue of control of the staples themselves. Since the special lending limit for loans secured by warehouse receipts transferring title to readily marketable staples is available only where the control requirement of 12 C.F.R. § 32.3(b)(1)(iv) is satisfied, the question of the qualifications of an independent registrar need not be resolved at this time.

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<sup>1</sup> The regulatory provision applicable to the special lending limits of 12 U.S.C. § 84 for readily marketable staples was formerly codified at 12 C.F.R. § 7.1560(a)(5) (1960). In response to the passage of the Garn-St Germain Depository Institutions Act of 1982, P.L. 97-320 (which also raised the general lending limit from 10 percent to 15 percent), the OCC amended its lending limit regulation in 1983 by creating a new Part 32 in Title 12 of the Code of Federal Regulations which replaced and restructured existing interpretive rulings previously found at 12 C.F.R. Part 7. 48 F.R. 15844 (April 12, 1983). The OCC further amended its lending limit regulation in 1995. 60 F.R. 8526 (March 17, 1995.) The superceded regulatory provision at 12 C.F.R. § 1560(a)(5) was substantially similar to current 12 C.F.R. § 32.3(b)(1).

<sup>2</sup> Unpublished letter from Thomas G. DeShazo, Deputy Comptroller of the Currency (January 28, 1975).

<sup>3</sup> Unpublished letter from Thomas G. DeShazo, Deputy Comptroller of the Currency (July 19, 1973).

## **Conclusion**

Under 12 U.S.C. § 84(c)(3) and 12 C.F.R. § 32.3(b)(1), special lending limits apply to loans secured by warehouse receipts or other documents transferring title to readily marketable staples. Under section (b)(1)(iv) of that regulation, the holder of the receipts must have control of the staples and be in a position to transfer them to the lending bank. Where the borrower is someone other than the owner of the elevator or warehouse, this requirement is satisfied if the warehouse owner holds the staples and issues receipts to the bank, since the bank may obtain delivery of the staples by presenting the receipts. However, where the borrower is the owner of the elevator or warehouse, as contemplated in 12 C.F.R. § 32.3(b)(1)(iv)(B), then there is a conflict of interest that precludes the borrower from acting as the repository--the bailee--of the collateral for his own loan.

Accordingly, the Bank may not qualify its loan to the Customer for the increased lending limits of 12 U.S.C. § 84(c)(3) and 12 C.F.R. § 32.3(b)(1) merely by entrusting the warehouse receipts to an independent third party.

Please do not hesitate to contact me at (202) 874-5300 if I may be of further assistance.

Sincerely,

**-signed-**

Sue E. Auerbach  
Senior Attorney  
Bank Activities & Structure Division