



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #979
January 2004
12 USC 84

December 18, 2003

Subject: Applicability of Lending Limit to Loans to [] Indian Community
of [*City, State*] and its members

Dear []:

I am writing in response to your request for our opinion as to the application of the lending limit, 12 U.S.C. § 84, to loans [*NB, City, State*] (Bank) has made, and plans to make, to [] Indian Community of [*City, State*] (Community) and to members of the Community. Based on the information in your letter and in subsequent telephone conversations, it is my opinion that for purposes of the lending limit a loan to one member would generally not be combined with a loan to another member, and that loans to members would generally not be combined with loans made to the Community.

Facts

The Community is located on the south side of the [] in [] County, two miles south of [*City*] and ten miles from the Bank in [*City, State*]. The population resident on the [] acre reservation of the Community was approximately 300 in the year 2000.¹ The population of [*Bank's City*] is approximately 1,300 and is largely dependent on the tribal enterprises run by the Community.

The Bank has made a loan to the Community, the purpose of which is to finance several loans that the Community wishes to make to several members of the Community and to augment a loan fund from which the Community will make loans to other members. The loan to the Community is secured by an assignment of the underlying loans made by the Community to the members. The source of repayment for the loan to the Community is ultimately the income from various tribal enterprises. This income supports the Community's payment of monthly stipends to the members and these stipends in turn are used by the members to repay their loans to the Community. The principal tribal enterprise is the [] casino. A gas station and

¹ [].

convenience store built in [] are adjacent to the casino. The Community also owns the nearby [] Motel with 122 rooms and swimming pool, a recreational vehicle park, and a six-story hotel with convention center that was built in [].

The Bank has also made general consumer loans to members of the Community that are secured by an assignment of the members' monthly stipends that they receive from the Community. The Bank may make further such loans although it is expected that no member will borrow from both the Bank and from the Community loan fund described above at the same time. The source of repayment for the Bank's loans to the members is the monthly stipends (currently \$5,200) that Community members are allotted by the Community. Tribal enterprises, such as the casino, and not the Bank's loan to the Community, support payment of these stipends by the Community. It is a requirement for receipt of the monthly stipend that the members live within a ten-mile radius of the Community's trust lands. Some members also receive wages from Community enterprises, though the Bank has never asked for an assignment of wages to secure loans to members of the Community, and it is assumed for the purposes of this analysis that the members do not receive sufficient wages from which their loans and other obligations may be fully repaid.

Legal Analysis

The purpose of the lending limit is to protect the safety and soundness of national banks by preventing excessive loans to one person and to promote diversification of loans and equitable access to banking services. Generally, a national bank's total outstanding loans to one borrower may not exceed 15 percent of the bank's capital and surplus, plus an additional 10 percent of capital and surplus if the amount over the 15 percent general limit is fully secured by readily marketable collateral.² Also, loans to one borrower will be attributed to another person and both will be considered a borrower when, among other things, (1) the proceeds are used for the direct benefit of the other person, or (2) a common enterprise is deemed to exist between the persons.

The proceeds of a loan to a borrower will be deemed to be used for the direct benefit of another person and will be attributed to that other person when the proceeds, or assets purchased with such proceeds, are transferred to that other person, other than in a bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services.³

A common enterprise is deemed to exist, *inter alia*, "[w]hen the expected source of repayment for each loan ... is the same for each borrower and neither borrower has another source of income from which the loan (together with the borrower's other obligations) may be fully repaid. An employer will not be treated as a source of repayment under this paragraph because of wages and salaries paid to an employee unless the standards of [the common control and substantial financial interdependence test]⁴ are met."⁵

² 12 U.S.C. § 84(a) and 12 C.F.R. § 32.3(a).

³ 12 C.F.R. § 32.5(b).

⁴ That test provides that a common enterprise is deemed to exist when borrowers are related through common control and there is substantial financial interdependence between or among the borrowers.

⁵ 12 C.F.R. § 32.5(c)(1).

1. Direct Benefit

The proceeds of the loan to the Community are used by the Community to make loans to members of the Community.⁶ However, such members do not also borrow from the Bank. Thus, while the direct benefit test requires that the loan to the Community be *attributed* to the members to whom the Community makes loans, those attributed loans are not *combined* with any other loans under the direct benefit test.⁷

There is no information in your letter regarding the transfer of proceeds of the loans to the members (or of assets purchased with such proceeds) from one member to another member or from the members to the Community. Accordingly, without further facts, there is nothing to support attribution of the loans to members to other members or to the Community.⁸

2. Common Enterprise

The expected source of repayment for the loan to the Community is the repayment of the Community's loans to the members that is dependent on the monthly stipends that are supported by income from tribal enterprises, principally the [] casino. The expected source of repayment for the current and future loans to the members of the Community is the monthly stipends that each member receives from the Community and that are derived from the same tribal enterprises. The expected source of repayment for the loan to the Community and the loans to the members is thus the same. Further, no borrower – neither the Community nor any member -- has another source of income from which the borrower's loan, and the borrower's other obligations, can be fully repaid. Accordingly, absent an exception, the loans would be combinable under the common source of repayment test – the members' loans with other members' loans⁹ and the members' loans with the loan to the Community.

⁶ Since the proceeds of the loan to the Community do not fund the stipends that the Community pays to members, the payment of stipends does not cause the direct benefit test to require that the loan to the Community be attributed to members.

⁷ If a member borrowed from both the Bank and from the Community, the direct benefit test would require that the part of the Bank's loan to the Community that the Community re-loaned to the member be combined with the Bank's loan to the member. The transfer of proceeds by the Community to such members would not be excepted by the exception for bona fide arm's length transactions where proceeds are used to acquire property, goods, or services. It is an established OCC position that "borrowed funds that are re-loaned to a third party would be attributed to the third party under this test." 59 Fed. Reg. 6593, 6596 (Feb. 11, 1994).

⁸ I assume that the members may acquire property, goods or services from the Community or its enterprises and that the Bank's loans to the members may support such transactions. Provided such transactions are bona fide arm's length transactions, they would not cause the direct benefit test to require the loans to the members to be attributed to the Community.

⁹ Some OCC precedent, beginning with interpretations of prior versions of the lending limit regulation, has taken the position that the common source of repayment test hinges on whether the repayment capacity of one borrower is dependent upon the financial health of another borrower rather than whether repayment will be made from the same expected source. Under this view, absent an exception a loan to a member of the Community would only be combined under the common source of repayment test with the loan to the Community on which the member is dependent, not with a loan to another member, since no member is dependent on another member. However, other

As noted above, an employer will not be treated as a common source of repayment because of wages and salaries paid to its employees, unless the employees control¹⁰ the employer and there is substantial financial interdependence between them. This position is sometimes referred to as the “company town” exception since it was originally intended to facilitate the granting of credit to employees in such a town. A “company town” is a town in which residents are dependent on the economic support of a single firm for maintenance of retail stores, schools, hospitals, and housing.¹¹ Without the exception, it would be difficult for a local bank to serve effectively the credit needs of the town’s residents. As noted above, one of the purposes of the lending limit is to promote equitable access to banking services.

The current case is very similar to the company town scenario in that all the members of the Community live in a single, small geographic location and are uniquely associated with, and dependent on, a single entity that is the community hub from a commercial and socioeconomic perspective. Thus, the need for equitable access to banking services is as important in the current factual circumstances as it is in the company town scenario. Further, there is a strong public interest in making available to Indian tribes and their members access to banking services, including credit products.¹² Although in the current case, payments received by the members are principally stipends rather than wages and salaries, the so-called company town exception is available in this case because of the unique and compelling similarities between the employer-employee relationship in a company town and the relationship between the Community and its members here. Accordingly, the loans to the members need not be combined under the common source of repayment test with loans to other members or with the loan to the Community.

OCC precedent has held loans to be combinable under the common source of repayment test in circumstances in which one borrower was not financially dependent on another borrower, based on the commonality of the source of repayment. The current regulation on its face does not require dependence on another borrower but rather requires neither borrower to have another source of income to fully repay its loan and other obligations. In light of this regulatory clarity, the correct position under 12 C.F.R. part 32 is that dependence on another borrower is not required under the common source of repayment test.

¹⁰ I note that the Community is comprised only of its members and those members elect a governing council to run the affairs of the Community. Such a democratic system does not involve concerted action by the members and does not constitute “control” for the purposes of this provision.

¹¹ See The American Heritage Dictionary of the English Language (4th ed., 2000).

¹² An entire Federal agency program – the Bureau of Indian Affairs’ Loan Guaranty, Insurance, and Interest Subsidy Program, 25 C.F.R. part 103 – exists to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing. The program helps borrowers secure conventional financing that might otherwise be unavailable. The OCC has long regarded access to banking services by Indian tribes and their members as an important public policy objective. For example, among other initiatives, the OCC hosts the Native American Banking Resource Directory at <http://www.occ.treas.gov/cdd/nativeam.htm> and has published “A Guide to Mortgage Lending in Indian Country” (Jul. 1997) and “Providing Financial Services to Native Americans in Indian Country (Jul. 1997). In addition, the OCC hosted a Native American Banking Forum in 2002 at which the OCC’s First Senior Deputy Comptroller and Chief Counsel noted “that the presence of banks is crucial for any community’s economic strength” and that “banks are developing a greater understanding that exploring and serving the financial needs of underserved populations fits in with their long-term self-interest.” See <http://www.occ.treas.gov/cdd/Williams101602.pdf>.

Please note that this letter responds only to the common enterprise lending limit issue raised in your letter. It does not address safety and soundness risks that may be posed by the loan to the Community or by loans to the Community members, individually or in the aggregate. Under 12 C.F.R. § 32.1(c)(4), the lending limit requires that loans made by national banks must be consistent with safe and sound banking practices.

Please also note that in reaching the foregoing conclusion, I have relied on the factual representations contained in your letter and in telephone conversations with OCC staff. The position set forth in this letter depends upon the accuracy and completeness of those representations and the facts set forth in this letter. Any change in circumstances could result in a different conclusion.

I trust the foregoing is responsive to your inquiry.

Sincerely,

/s/ Jonathan Fink

Jonathan Fink
Senior Attorney
Bank Activities & Structure