



# Office of the Comptroller of the Currency

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## Interpretations - Conditional Approval #215

*Published in Interpretations and Actions October 1996*

October 1996

September 11, 1996

Board of Directors, The Women's Bank, N.A.

c/o Ernest J. Panasci

Freeborn & Peters

950 Seventeenth Street, Suite 2600

Denver, Colorado 80202-4200

Re: Notice of The Women's Bank, N.A., Denver, Colorado, of Intent to Establish an Operating Subsidiary Pursuant to 12 C.F.R. 5.34 which will Become a Member of a Limited Liability Company - Application Control Number 96-WE-08-005

Dear Mr. Panasci:

This is in response to the operating subsidiary notice ("Notice") filed by The Women's Bank, N.A. ("the Bank") with the OCC pursuant to 12 C.F.R. 5.34. We have now completed our review and your notice is hereby approved, as described herein.

### **FACTS**

The Bank submitted a notice of intent to establish Colorado Mortgage Lending, Inc. ("the Mortgage Company") as an operating subsidiary pursuant to 12 C.F.R. 5.34. The Bank will own 100% of the Mortgage Company, which will conduct traditional mortgage lending activities, and will purchase a 75% interest in a limited liability company (LLC) organized under the Delaware Limited Liability Company Act, to be known as Parallel Commercial Capital of Colorado, LLC ("the LLC.") The other 25% share in the LLC will be held by Parallel Commercial Capital, LLC, ("PCC") which itself is a Delaware limited liability company operating in New York, New York. PCC's principal business is the buying and selling of commercial real estate loans. PCC granted the LLC a license to use a variation of its name to conduct the proposed business.

The proposed activities of the LLC are to originate and sell commercial real estate loans in amounts ranging from \$150,000 to \$1,500,000. These are, of course, permissible banking activities. PCC will provide investors to fund the loans to be made by the LLC.

As the funding for loans made by the LLC will come from third-party investors, the loans will not appear on the financial statements of the LLC. However, there will be recourse by the third-party investors against the LLC with regard to the loans. As part of the recourse arrangement, the Bank, as the ultimate parent corporation of the LLC, will guarantee the loans originated by the LLC in an aggregate amount

not to exceed \$250,000, and the Bank, as the sole owner of the Mortgage Company, will issue a letter of credit to the LLC in the amount of \$250,000 for purposes of securing the obligations of the LLC under the recourse arrangement.

## DISCUSSION

Your letter raises the issue of the authority of a national bank to make a controlling, majority investment in a LLC. The OCC has in a variety of circumstances concluded that it is lawful for a national bank to own an interest in an LLC. *See, e.g.,* Interpretive Letter No. 645 (April 29, 1994), *reprinted in* [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) 83,554; and Interpretive Letter No. 657 (March 31, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) 83,605. In approving a national bank's majority participation in an LLC, the OCC has looked at whether the underlying activities are permissible under 12 U.S.C. 24 (Seventh) as part of, or incidental to, the business of banking, whether the national bank has the power to influence and, if necessary, withdraw from the membership in the LLC in the event the LLC engages in activities which are impermissible for national banks, and whether the national bank is shielded from unlimited liability for the acts of the LLC. <NOTE: The OCC has also concluded that national banks are legally permitted to make a minority, non-controlling investment in an LLC provided four criteria or standards are met. *See* Interpretive Letter No. 692 (November 1, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) 81,007.> Each of these factors is discussed below and applied to your proposal.

*1. The activities of the entity or enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking.*

The proposed activities of the LLC--the origination and sale of commercial real estate loans--are legally permissible under 12 U.S.C. 24 (Seventh) (a national bank may carry on the business of banking ". . . by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits . . . [and] by loaning money . . ."). National banks have the express authority under 24 (Seventh) to make loans. Incidental to this authority, national banks have the ability to make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate pursuant to 12 U.S.C. 371 and 12 C.F.R. Part 34.

Therefore, the proposed activities of the LLCs are part of, or incidental to, the business of banking.

*2. The bank must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard.*

This is an obvious corollary to the first standard. It is not sufficient that the LLC's activities are permissible at the time the bank initially purchases the LLC membership shares; they must also remain permissible for as long as the bank retains an ownership interest in the LLC.

Under Delaware law, [u]nless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all the members, the decision of members owning more than 50 percent of said percentage or other interest in the profits controlling . . ." DEL. CODE ANN. tit. 6, 18-402 (1994). Here, the Bank, by virtue of its 75 percent membership interest in the LLC, will have a majority voice in all LLC matters. Therefore, the Bank will have the power necessary to ensure that the LLC continues to engage in only those activities which are permissible for national banks. *3. The Bank's loss exposure must be limited and the Bank must not have open-ended liability for the obligations of the enterprise.*

A primary concern of the OCC is that national banks should not be subjected to undue risk. Where, as here, an investing bank will have control over the operations of the entity in which the bank holds an interest, it is unlikely that the bank's investment will expose it to unlimited liability. As a legal matter, investors in a Delaware LLC will not incur liability with respect to the liabilities or obligations of the LLC solely by reason of being a member or manager of the LLC--even if they actively participate in the management or control of the business. DEL. CODE ANN. tit. 6, 18-303 (1994). This limited liability feature is what differentiates LLCs both from general partnerships, where all the partners are generally liable for the debts of the partnership, and from limited partnerships, which must have at least one general partner who is personally liable for the obligations of the partnership. Thus, the Bank's loss exposure for the LLC's liabilities will be limited by statute.

The OCC has previously noted that the appropriate accounting treatment for a bank's ownership of more than a 50 percent interest in a LLC raises the presumption of control over the LLC. Here, the Bank clearly will have control over the affairs of the LLC. The Bank would, therefore, be required to report the LLC on a consolidated basis. Interpretive Letter 692, *supra*. In addition, the LLC will be subject to examination and supervision by the OCC in the same manner and to the same extent as the Bank. Because the Bank will control the LLC, when the LLC is consolidated, any losses attributable to the LLC will be the result of the Bank's actions, and not any other member or third party. Therefore, the Bank's loss exposure should be within its control.

## CONCLUSION

For the reasons discussed above, the Bank's investment in the LLC through the operating subsidiary satisfies the three standards for a national bank's majority, controlling, investment in an LLC. Therefore, the Bank's operating subsidiary notification is approved subject to the following conditions:

1. The LLC will engage only in activities that are part of, or incidental to, the business of banking;
2. The Bank will have veto power over any activities and major decisions of the LLC that are inconsistent with Condition Number One or will withdraw from the LLC in the event that it engages in activities that are inconsistent with Condition Number One; and
3. The LLC will be subject to OCC regulation, supervision and examination.

Please be advised that all conditions of this approval shall be deemed to be "conditions imposed in writing by the agency in connection with the granting of any application or other request" within the meaning of 12 U.S.C. 1818.

If you have any questions or comments, please contact National Bank Examiner Maeve O'Meara at (415) 545-5923. A separate letter is enclosed requesting your feedback on how we handled your application. We would appreciate your response so we may improve our service.

Very truly yours,

/s/

RUFUS O. BURNS, JR.

District Administrator

Western District

**The Women's Bank, N.A.**

Control Number 96-WE-08-005