Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

December 18, 2002

Interpretive Letter #950
12USC 29B
12 USC 84(a)(1)
12 USC 371D

Re: Loans made by a national bank to an entity used as part of the bank's like-kind exchange of bank premises

Dear **[ ]**:

This letter is in response to your October 18, 2002, letter addressed to Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel. In your letter, you ask how the OCC would apply the legal lending limit statute, 12 U.S.C. § 84, to a national bank ("Bank") using the tax-deferred exchange provisions under section 1031 of the Internal Revenue Code of 1986 to effect a like-kind exchange of bank premises.

Briefly, the Bank enters into a contract to purchase a piece of new property upon which will be constructed its new office building, assigns the contract to an unrelated entity ("Newco"), and extends credit to Newco to purchase the new property. Newco will be responsible for constructing the new office building. At the same time, the Bank enters into a lease with Newco, with the lease payments being large enough to cover debt service on the loan to Newco plus Newco's fee for participating in the transaction. Ultimately, the Bank's existing main office is sold, the sales contract is assigned to an affiliate of Newco, and the affiliate sells the old office building. The affiliate then uses the proceeds to buy the new building from Newco and transfers the new building to the Bank. At that time, any amount due on the loan to Newco is repaid.

It is my opinion that the Bank's loan to Newco would be an extension credit for purposes of 12 U.S.C. § 84. Section 84(b)(1) defines "loans and extensions of credit" to "include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person …". Based upon your fact pattern, the loan by the Bank to Newco meets this definition. Therefore, under section 84(a)(1), the total outstanding loans made by the Bank to Newco would be limited to 15 percent of the Bank's unimpaired capital and surplus.

However, because Newco would hold bank premises,[1] the Bank may take advantage of 12 U.S.C. § 371d. Section 371d provides in part that:

> No national bank or State member bank shall invest in bank premises, or in the stock, bonds, debentures, or other such obligations of any corporation holding the premises of such bank, or make loans to or upon the security of any such corporation– … (2) unless the aggregate of all such investments and loans, together with the amount of any indebtedness incurred by any such corporation that is an affiliate of the bank, is less than or equal to the amount of the capital stock of such bank; …

Under this section, a national bank must aggregate its direct investments in bank premises and corporations that hold bank premises, its loans to such corporations, and any indebtedness incurred by such corporations which are affiliates of the national bank.[2] This total may not exceed an amount equal to the bank's capital stock (unless certain other requirements are satisfied).

If a national bank has no other "investments" in bank premises, then section 371d would authorize the national bank to lend money to an unaffiliated corporation holding bank premises in an amount equal to the bank's capital stock.[3] Therefore, if section 371d's aggregate limits are otherwise satisfied, it is my opinion that the Bank could loan Newco an amount which would exceed the limitations contained in 12 U.S.C. § 84. Rules of statutory interpretation strongly presume that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one."[4] For example, with respect to extensions of credit made by national banks to their affiliates, the OCC has determined that the more specific affiliate transaction statute, 12 U.S.C. § 371c, takes precedence over the general lending limits in section 84.[5]

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[1] Under 12 U.S.C. § 29(First), a national bank may invest in real estate that is necessary for the transaction of its business. Twelve C.F.R. § 7.1000(a)(2)(i) provides that this real estate includes "[p]remises that are owned and occupied *(or to be occupied, if under construction)* by the bank …" (emphasis added). Section 7.1000(a)(3) further provides that national banks may acquire and hold such real estate by means of a leasehold estate. Therefore, the new property that the Bank is leasing and upon which the Bank's new building is being constructed by Newco is bank premises.

[2] Section 371d does not require that corporations holding bank premises be affiliates of the national bank. *See* Letter from James J. Saxon, Comptroller of the Currency (Mar. 26, 1964) (unpublished). Rather, this section requires only that the national bank include in its aggregate investment in bank premises any indebtedness incurred by corporations that are affiliates of the bank.

[3] In this case, the Bank would have two such "investments" – the investment in its current office building and the loan to Newco – that must be aggregated.

[4] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 410 (1999), (*quoting Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). *Accord Morton v. Marconi*, 417 U.S. 535, 550-51 (1974).

[5] *See* 12 C.F.R. § 32.1(c); Letter from Rosemarie Oda, Senior Attorney, Legal Advisory Services Division (Jan. 25, 1985) (unpublished).

While the section 84 lending limits would not apply, any extension of credit by the Bank to Newco must conform with safe and sound banking practices. If you have any questions, please contact me at (202) 874-5300.

Sincerely,

/s/ Steven V. Key

Steven V. Key
Senior Attorney