

Interpretive Letter No. 00-01 (January 3, 2000)

When a bank extends credit to commercial equipment leasing company under a "Without Recourse" note with the leasing company, the lending limit and obligation for repayment will attach to the lessee rather than the leasing company.

This is in response to your letter of November 24, 1999, in which you sought an opinion from the Office of Banks and Real Estate (the "Agency") on whether the loan limitations contained in Section 32 of the Illinois Banking Act, [205 ILCS 5/1 et seq.] (the "Act") apply to certain non-recourse commercial equipment lease loans. Your inquiry presented a proposal whereby an Illinois state-chartered bank would extend credit to a commercial equipment lessor (the "Leasing Company"). The note would be "without recourse" against the lessor and the lending bank would rely instead on the payment obligations of the lessee. For the reasons stated below, it is the Agency's opinion that because the bank will be relying on the lessee for payment of the obligation, the loan limitations of Section 32 will apply to the lessee, rather than the leasing company.

As you stated in your letter, the Office of the Comptroller of the Currency ("OCC") has promulgated a rule permitting a national bank to loan funds to a leasing company to purchase equipment for lease while deeming the amount loaned to be the obligation of the lessee rather than the leasing company. 12 CFR 32.3(c)(10) provides as follows:

A loan or extension of credit to a leasing company for the purpose of purchasing equipment for lease will be deemed a loan to the lessee, provided that:

- (i) The bank evaluates the creditworthiness of the lessee before the loan is extended to the leasing corporation;
- (ii) The loan is without recourse to the leasing corporation;
- (iii) The bank is given a security interest in the equipment and in the event of default, may proceed directly against the equipment and the lessee for any deficiency resulting from the sale of the equipment;
- (iv) The leasing corporation assigns all of its rights under the lease to the bank;
- (v) The lessee's lease payments are assigned and paid to the bank; and
- (vi) The lease terms are subject to the same limitations that would apply to a national bank acting as a lessor. 12 CFR 32.3(c)(10).

Under Section 5(11) of the Act, a state bank may do any act that is authorized or permitted for a national bank, provided that such act is subject to the same limitations and restrictions that are applicable to the national bank. 205 ILCS 5/5(11). Therefore, if the state-chartered bank complies with the six conditions prescribed in 12 CFR 32.3(c)(10)(i) through (vi), that bank may extend credit under a "without recourse" note to a commercial equipment leasing company and that extension of credit will be applied against the loan limitations of the lessee, the source of repayment, rather than the leasing company.

Alternatively, Section 34(4) of the Act provides that the loan limitations in Section 32 of the

Act do not apply to "obligations as endorser...of negotiable or nonnegotiable installment consumer paper of the person transferring the same if the bank's files or the knowledge of its officer of the financial condition of each maker of those obligations is reasonably adequate and an officer of the bank...certifies that the responsibility of each maker of the obligations has been evaluated and that the bank is relying primarily upon each maker for the payment of the obligations." 205 ILCS 5/34(4). Although the Act does not define "consumer paper", the OCC regulations provide that the term includes paper covering the lease (where the bank is not the owner or lessor) or purchase of equipment for use in manufacturing, farming, construction, or excavation. 12 CFR 32.2(e). Therefore, under the provisions of Section 34(4), if an officer of the bank certifies that the responsibility of the lessee has been evaluated and that the bank is relying primarily on the lessee rather than the leasing company for repayment of the note, the bank may extend credit to the leasing company without loan limitations that otherwise may be applicable. Rather, the loan limitations would apply to the obligation(s) of the underlying lessees.

An extension of credit may be made to a commercial equipment leasing company under Section 34(4) or Section 5(11) and in both cases the lending limitation and obligation for repayment will attach to the lessee rather than the leasing company. A bank may prefer making the extension of credit under the authority of Section 34(4) because it requires only a certification by an officer of the bank that the responsibility of each maker or lessee has been evaluated. The certification shall be in writing and be retained as part of the records of the bank. Under Section 5(11), however, the bank must comply with all of the provisions listed in 12 CFR 32.3(c)(10).