

Comptroller of the Currency
Washington, DC 20219

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No Objection Letter No. 88-3

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March 29, 1988

[*1]

Bruce A. Smith, Esq., Sturn, Smith & Webster, 2nd Floor, American National Bank Building, P.O. Box 393, Vincennes, Indiana 47591

Dear Mr. Smith:

This is in response to your letter dated August 10, 1987, concerning the American National Bank of Vincennes ("Bank"). You request our "no objection" to your position that loans to a limited partnership need not be combined with loans to the general partner of that partnership, where the general partner has no liability for the limited partnership debt. We do not agree with your position. Hence, we are unable to offer our "no objection."

The facts of this matter are simple. The Bank currently has loans outstanding to the general partner of the limited partnership. The Bank now proposes to extend a loan to the limited partnership. The general partner will not personally guarantee this loan, nor otherwise be obligated in any way on the debt. The Bank is satisfied with the capacity of the limited partnership to service the proposed debt. Further, the personal debt of the general partner was used for purposes unrelated to the business of the limited partnership. Based upon these facts, you opine that the loan to the limited [*2] partnership need not be combined with the loan to the general partner. We disagree.

As here pertinent, 12 C.F.R. 32.5(c)(1) states, as follows:

Loans or extensions of credit to a partnership, joint venture, or association shall, for purposes of this part, be considered loans or extensions of credit to each member of such partnership, joint venture, or association.

Thus, loans to a partnership are attributed to each member of the partnership

and are combined with any other loans, regardless of purpose, to the partner. In 1983, at the time Part 32 was adopted, the OCC gave consideration to allowing general partners to exculpate themselves from partnership liability.

Some commenters suggested that loans to partnerships need not be attributed to partners where the bank has agreed to seek recourse only to the partnership assets and not to the partners individually. This suggestion was not adopted primarily because the Office believes it would provide banks with an incentive to make "nonrecourse" loans in cases where to do so would be imprudent. Past experience with a similar limited liability concept concerning loans that was in effect for a period during the 1960s showed [*3] this to be true. 48 Fed. Reg. 15848 (Apr. 12, 1983).

The official comments which accompanied the publication of Part 32 go on to discuss limited partners and how partnership liability is not attributed to them.

A number of commenters suggested that the Office expand its proposed rule under which limited partners are not governed by the per se combination rules of @ 32.5(c) to include members of joint ventures or associations whose potential liability resembles that of a limited partner. The Office has adopted this suggestion. Id.

Thus, Section 32.5(c)(1) governs loans to general partners and their partnerships. Loans to such partnerships are attributed to all general partners regardless of the purposes of the loans, and regardless of the lending bank's ability to pursue legal recourse against the general partners. Section 32.5(c)(3) is only meant to provide an exception for limited partners and members of other associations or ventures whose legal status is comparable to a limited partner. By definition, a general partner's legal status is never comparable to that of a limited partner.

We trust this is responsive to your inquiry.

Very truly yours, [*4]

James M. Kane
District Counsel
Central District

INCOMING LETTER FOR NO OBJECTION #88-3

August 10, 1987

Office of the Comptroller of the Currency

Springfield Field Office
Washington Building, Suite 5
Four Old Capitol Plaza North
Springfield, Illinois 62701

Dear Sirs:

Please consider this letter the written request of The American National Bank of Vincennes for a "no-objection position", seeking the view of the OCC staff as to whether it would express any objection if the transaction which we described hereinbelow were implemented.

ISSUE: Whether a national banking association may make loans and extensions of credit to a limited partnership up to the amount of its applicable lending limit under U.S.C. 84(a)(1), and not include, for purposes of computation of such applicable lending limit, the individual indebtedness of the general partner of such limited partnership, where the general partner has absolutely no personal liability or obligation for repayment of the loans and extensions of credit to the limited partnership.

BRIEF ANSWER: Yes.

It is the clear purpose of the Lending Limitation Regulation to prevent one individual, or a relatively small [*5] group, from borrowing an unduly large amount of the bank's funds, and to safeguard the bank's depositors by spreading the loans among a relatively large number of persons engaged in different lines of business. The proposed lending transaction described hereinbelow is not violative of the purpose of the Lending Limitation Regulation, and should not be objectionable to the Comptroller of the Currency.

I. CONTROLLING FACTS:

The American National Bank of Vincennes ("ANB") has an effective lending limit of approximately Two Million Six Hundred Thousand Dollars (\$2,600,000.00) under 12 U.S.C. 84(a), as of the date of writing this letter. One of the bank's customers, Michael G. Browning, currently has obtained loans and extensions of credit from the ANB totaling One Million Seven Hundred Forty-five Thousand Dollars (\$1,745,000.00), consisting of a Five Hundred Forty-five Thousand Dollar (\$545,000.00) first mortgage indebtedness on the personal residence of Mr. Browning, and a One Million Two Hundred Thousand Dollars (\$1,200,000.00) indebtedness which is secured by Five Hundred Thirty-three (533) shares of Emmis Broadcasting Corporation closely-held stock. The Emmis Broadcasting [*6] Corporation is not affiliated with the limited partnership which is the subject of this letter.

The ANB proposes to serve as the lead bank in a proposed loan to Meridian Mile Associates, Ltd. of Three Million Two Hundred Thousand Dollars (\$3,200,000.00). Of the Three Million Two Hundred Thousand Dollars (\$3,200,000.00), the ANB proposes to retain Two Million Dollars (\$2,000,000.00) in-house, and sell to the Dubois County Bank, as a participating bank, One Million Two Hundred Thousand Dollars (\$1,200,000.00) of the loan. The loan is to be used to refinance an office building situated on North Meridian Street, Carmel, Indiana, and will be fully secured with a real estate mortgage on the subject office building, together with the assignment of leases with Hewlett-Packard Corporation (the subject office building is fully leased to Hewlett-Packard Corporation, and will be for the entire course of the repayment of the proposed loan). The limited partnership additionally holds two other office buildings which are either one hundred percent (100%) leased, or nearly one hundred percent (100%) leased. Although the ANB will not take a mortgage as to two said office buildings, it appears [*7] from the financial statement of the limited partnership that sufficient equity position could exist in the two buildings to provide sources of funds for repayment of the proposed indebtedness.

Michael G. Browning is the general partner of Meridian Mile Associates, Ltd. He owns fifty percent (50%) of the limited partnership. Under the proposed loan transaction, Browning will not personally guarantee the debt, nor will he be personally liable or obligated for repayment of the proposed loan. None of his personal assets will be held as security or collateral for the repayment of the proposed loan. Browning does not, and will not rely on any income from Meridian Mile Associates, Ltd. for the repayment of his personal indebtedness to the ANB. In summary, the personal loans to Michael G. Browning and the proposed loan to Meridian Mile Associates, Ltd. are in no way inter-related or affiliated other than by reason of the fact that Mr. Browning is the general partner of the limited partnership. Browning is a partner in twelve (12) to fifteen (15) other partnerships, and his main source of income is Browning Investments, Inc., which had a net income of approximately Nine Million Dollars [*8] (\$9,000,000.00) during the fiscal year 1986.

II. DISCUSSION:

12 U.S.C. 84(a)(2) establishes the general limitation of loans, and prohibits loans in excess of that limitation to be outstanding to "a person" at any one time. The combining of loans to separate borrowers is discussed in 12 C.F.R. 32.5, which states the general rule that "Loans or extensions of credit to one person will be attributed to other persons, for purposes of this Part, when (i) the proceeds of the loans or extensions of credit are to be used for the direct benefit of the other person or persons or (ii) a 'common enterprise' is deemed to exist between the persons." It is clear from the foregoing statement of facts that Michael G. Browning is not to receive any direct benefit from the loans or extensions of credit which are proposed, as the entire loan proceeds are to be

used for the refinancing of the office building owned by Meridian Mile Associates, Ltd. The question then becomes whether a "common enterprise" is deemed to exist between Michael G. Browning and Meridian Mile Associates, Ltd. Under 12 C.F.R. 32.5, the resolution of this questions depends upon a realistic evaluation of the facts and [*9] circumstances of particular transactions. One of the indicia of a common enterprise is where the expected source of repayment for each loan or extension of credit is the same for each person. Under the statement of controlling facts contained hereinabove, it is clear that Michael G. Browning does not rely upon Meridian Mile Associates, Ltd. income as a source of repayment for his personal debt; and it is also clear that Meridian Mile Associates, Ltd. does not rely upon income from Michael G. Browning for repayment of its proposed loan from the ANB, because Mr. Browning is not in any way personally liable for the repayment of said loan.

12 C.F.R. 32.5(a)(2)(iii) discusses further indicia of a "common enterprise", including common control by persons engaged in interdependent businesses, and substantial financial interdependence. Again, it is clear from the recited controlling facts that no common enterprise can be found between Michael G. Browning and Meridian Mile Associates, Ltd. under this subsection due to the fact that their respective businesses are not in any interdependent or financially interdependent. Under that subsection, a common enterprise will be deemed to exist [*10] when fifty percent (50%) or more of one person's gross receipts or gross expenditures are derived from transactions with the other person related through common control. Such is not the case here. It is clear that Subsection (iv) of 12 C.F.R. 32.5(a)(2) does not apply in this particular situation.

Therefore, it is clear that no common enterprise exists between Michael G. Browning and Meridian Mile Associates, Ltd. Discussion must then turn to 12 C.F.R. 32.5(c) which deals with loans to partnerships, joint ventures, and associations. It is the general rule, as stated in said subsection, that loans or extensions of credit to a partnership shall be considered loans or extensions of credit to each member of such partnership. However, it is stated as an exception to such general rule, in Subsection iii thereof, that "The rule set forth in paragraph (c)(i) of this subsection is not applicable to limited partners in limited partnerships or to members of joint ventures or associations if such partners or members, by the terms of the partnership or membership agreement are not to be held liable for the debts or actions of the partnership, joint venture or association". It would be [*11] clear that Michael G. Browning's personal debt would not be considered with the proposed debt of Meridian Mile Associates, Ltd. for debt limit purposes if Mr. Browning were a limited partner of Meridian Mile Associates, Ltd. However, even though Mr.

Browning is a general partner therein, it is submitted that for purposes of 12 C.F.R. 32.5(c)(3), Mr. Browning is effectively a limited partner for this

transaction because he is not in any way to be held liable for the debts or actions of the limited partnership, for purposed of this loan.

Sincerely yours,

Bruce A. Smith
General Counsel for The American National Bank of Vincennes