

OCC Publishes Lending Limit Guidance on Loan Purchase Activities*

On August 8, 2023, the Office of the Comptroller (OCC) published Bulletin 2023-27 entitled “Loan Purchase Activities: Legal Lending Limit Guidance” (the “Bulletin”). The Bulletin provides national banks, federal savings associations, and federal branches and agencies of foreign banking organizations (together “Covered Institutions”), guidance regarding the applicability of the legal lending limit to purchased loans.

First, some background. Loans and extensions of credit made by Covered Institutions are subject to a lending limit which limits the total amount of loans and extensions of credit the institution may make to any one borrower. The OCC has issued regulations in 12 CFR Part 32 which address the amount of the lending limits and how to apply the lending limits.

In the Bulletin, the OCC notes that whether a loan that a Covered Institution purchases is attributable to either the seller or borrower for purposes of applying the lending limit will depend on the specific facts and circumstances. The OCC provides that under 12 CFR Section 32.2(q)(1)(iii), purchased loans are attributable to the seller of the loan (as opposed to the borrower) if the institution has direct or indirect recourse to the seller. Notably, the Bulletin provides that direct or indirect recourse may be “explicit” or “implied.” The Bulletin further states that if the Covered Institution does not have explicit or implied recourse to the seller, the loans would be generally attributable only to the named borrowers on the loans, as opposed to the sellers, unless another provision of the OCC’s lending limit regulations indicate the purchased loans should be attributable to another party.

The Bulletin also provides guidance on what might qualify as explicit or implied recourse in a loan sale arrangement.

Explicit Recourse: Explicit recourse is generally provided under contractual arrangement or other written agreement between the Covered Institution and the seller. Examples of explicit recourse might include a requirement or contractual obligation to substitute or repurchase defaulted loans or refill a reserve account, even if no substitutions, repurchases, or replenishments of the reserve account have occurred to date.

Implied Recourse: Implied recourse is established through a course of dealing or conduct with a seller even if the contract or written agreement with the seller does not contain explicit recourse. Examples of situations where implied recourse might be present include when the seller has routinely substituted or repurchased loans or refilled or replenished a reserve account even when the contract does not require those actions.

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The Bulletin is a significant development since when determining whether the lending limits for a loan should be applied to the seller of the loan (as opposed to the borrower), a Covered Institution will now need to determine whether the institution has recourse against the seller with regard to the loan due to a course (or history) of dealing or conduct between the parties (*i.e.*, implied recourse) and not just the terms of the contract governing the sale.

The Bulletin can be read in its entirety on the OCC's website at <https://www.occ.treas.gov/news-issuances/bulletins/2023/bulletin-2023-27.html#ft3>. For more information or questions on lending limit regulations, institutions can reach out to Joel Cook (JCook@ABLAWYERS.COM) or John Davis (JDavis@ABLAWYERS.COM) at the law firm.