



Federal Housing Finance Board

August 26, 1993

MEMORANDUM:

TO: Beth L. Climo
General Counsel

THROUGH: Renie Y. Grohly
Deputy General Counsel

FROM: Brandon B. Strauss
Attorney-Advisor

SUBJECT: Commercial Lending Authority of Federally Chartered Savings Associations

You have requested a memorandum discussing the commercial lending authority of federally chartered savings associations under section 5 of the Home Owners' Loan Act ("HOLA"), ch. 64, § 5, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. § 1464 (Supp. IV 1992)).

I. Commercial Lending Authority under HOLA of Federally Chartered Savings Associations

Under section 5 of HOLA federally chartered savings associations may make commercial, corporate, business, and agricultural loans in an amount equal to no more than ten percent of their assets. See 12 U.S.C. 1464(c)(2)(A) (Supp. IV 1994). Section 5(c)(2) of HOLA as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ('FIRREA'), Pub. L. No. 101-73, § 301, 103 Stat. 83, 286 (1989), states:

The following loans or investments are permitted, but only to the extent specified:

(A) Commercial and other loans

Secured or unsecured loans for commercial, corporate, business, or agricultural purposes. The aggregate amount of loans under this paragraph shall not exceed 10 percent of the assets of the Federal savings association.

Id. ("commercial lending provision").

The commercial lending provision was originally added to HOLA in 1982 by Title III of the Garn-St Germain Depository Institutions Act ("DIA"), Pub. L. No. 97-320, 96 Stat. 1469 (1982), which provided for increased investment powers for

federally chartered savings institutions. Section 325 of the DIA states that federally chartered savings and loan associations and federally chartered savings banks may make:

[s]ecured or unsecured loans for commercial, corporate, business, or agricultural purposes. No association may make loans to one borrower under the authority provided by this subparagraph in excess of the amount a national bank having an identical total capital and surplus could lend such borrower. The aggregate amount of loans under this paragraph shall not exceed 5 percentum of the assets of a savings and loan association (7.5 percentum of the assets of a savings bank) prior to January 1, 1984, or 10 percentum of the assets of a savings and loan association or savings bank thereafter.

96 Stat. 1500 (1982); 12 U.S.C. § 1464(c)(1)(R) (1988) (amended and recodified at 12 U.S.C. § 1464(c)(2)(A) (Supp. IV 1992)).

The only substantive change to the commercial lending provision made by FIRREA was the elimination of the sentence limiting loans to one borrower. See FIRREA § 301, 103 Stat. 286 (1989). This change probably was made because section 301 of FIRREA added a new section to HOLA generally governing loans to one borrower, which provides that federally chartered savings associations are generally subject to the same loans-to-one-borrower standards that apply to national banks. See id. § 301, 103 Stat. 310 (1989); 12 U.S.C. § 1464(u) (Supp. IV 1992).

II. Legislative History of the Commercial Lending Provision

The Conference Report accompanying the DIA states that the new investment powers for federal thrift institutions contained in the DIA, such as the commercial lending authority, were intended "to improve the range of services thrift institutions may provide to their customers and to improve their ability to generate earnings to sustain the growth of capital needed for future operations." See Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 641, 97th Cong., 2d Sess. 87 (1982) ("DIA Conf. Rep.").

The DIA Conference Report further states that the increased investment powers for federal thrifts were "intended to strengthen the thrift industry so that it may maintain its place as the nation's primary home lender." Id. at 88. The report accompanying the Senate bill indicates that the new investment powers were intended to make federal thrifts more competitive with state-chartered thrift institutions that enjoyed broader powers under recently enacted state laws. See S. Rep. No. 536, 97th Cong., 2d Sess. 15 (1982) (DIA Sen. Rep.).

The Senate bill initially provided that no more than half of the commercial lending authority could be used for loan originations, with the remainder to be used for loan participations or purchases. See DIA Sen. Rep. at 15. The Conference Committee did not adopt this limitation in the statute, and it stated in the Conference Report that "[t]his commercial lending authority may be in the form of either direct loans or participations." See DIA Conf. Rep. at 88.

The legislative history of section 301 of FIRREA, which amended the commercial lending provision as described in part I of this memo, and recodified it at section 5(c)(2)(A) of HOLA, does not contain any explanatory comment on these changes.

III. Office of Thrift Supervision Regulations Implementing the Commercial Lending Provision

Section 545.46 of the Office of Thrift Supervision ("OTS") regulations implements the commercial lending provision. Section 545.46 reads as follows:

(a) Investment authority. Pursuant to section 5(c)(2)(A) of the [Home Owners' Loan] Act, a Federal savings association may invest in, sell, purchase, participate in, or otherwise deal in loans for commercial, corporate, business, or agricultural purposes: Provided, That at any one time the total investment made under this section shall not exceed five percent of the Federal savings association's assets (or 7.5 percent in the case of a savings bank) prior to January 1, 1984, and ten percent thereafter.

(b) Loans covered. Notwithstanding the provisions of § 545.31 of this chapter [allowing a Federal savings association to designate a loan under a particular investment authority when the loan is authorized under several sections of HOLA], the percentage-of-assets limitations in paragraph (a) of this section shall apply to:

- (1) Overdraft loans on demand accounts; and
- (2) Commercial loans not secured by real estate that are made by a service corporation of the Federal savings association:

Provided, That, in the case of a service corporation with multiple stockholders, the amount of such loans attributed to one stockholder Federal savings association will be calculated pro rata on the basis of the percentage of the service corporations' stock owned by the Federal savings association.

12 C.F.R. § 545.46 (1993).

Section 545.46 was originally promulgated by the former Federal Home Loan Bank Board ("FHLBB") in 1983, see 48 Fed. Reg. 23058 (May 23, 1983), and was redesignated, without substantive modification, as an OTS regulation in 1989. See 54 Fed. Reg. 49492 (Nov. 30, 1989).

The preamble to § 545.46 states that the FHLBB interpreted the commercial lending provision in HOLA to authorize federally chartered savings associations to engage in the same type of lending that is considered commercial lending by national banks. See 48 Fed. Reg. 23045. The preamble states:

[t]he only distinction between the commercial lending authority in [HOLA] and the commercial lending authority of national banks is that the percentage of assets a Federal association may invest in such loans is limited [to the percentages contained section 5 of HOLA].

Id.

Commercial loans made pursuant to § 545.46 may take the form of: loan transactions where funds are advanced in exchange for a term note or under a revolving credit agreement; the purchase of business accounts receivable; reverse repurchase agreements with a corporate entity; a deposit with a financial institution; the acceptance of a customer's time draft; or the purchase of debt obligations of a business entity. See id.

Any loan to a business enterprise is considered to come within the commercial lending authority under § 545.46 since a business purpose may be presumed. See id. Further, loans to a government or nonprofit organization qualify as commercial loans under § 545.46 since such loans are included in the commercial lending authority of national banks. See id.

IV. Legal Interpretations of the Commercial Lending Provision by the FHLBB and the OTS

The former FHLBB and the OTS have opined that federally chartered savings associations are authorized to make the following types of loans or investments pursuant to the commercial lending provision in HOLA, as implemented by § 545.46 of the FHLBB (now OTS) regulations: 1) investments in debt obligations issued by foreign corporations and denominated in foreign currency, see FHLBB Opin. by Quillian (June 12, 1987); OTS Mem. by Miner and Shepard (Apr. 8, 1993); OTS Opin. by Lieberman (June 18, 1993); 2) investments in mortgage-backed bonds secured by an assignment of mortgage loans for one-to-four family homes, see FHLBB Opin. by Raiden (Oct. 9, 1984); 3) investments in guaranteed investment contracts, see

FHLBB Opin. by Quillian (June 12, 1986).

Further, the FHLBB issued legal memoranda interpreting the commercial lending provision to authorize: 1) loans to foreign borrowers, see FHLBB Mem. by Long, (July 2, 1984); 2) investment in accounts in foreign banks, see FHLBB Mem. by Doyle (July 12, 1983); 3) loans to employee stock ownership plans, see FHLBB Mem. by Williams (Jan. 31, 1986); 4) investments in certain closed-end investment trusts, see FHLBB Mem. by Smith (July 22, 1986); 5) mortgage loan servicing, see FHLBB Mem. by Williams (Apr. 8, 1986); and 6) loan brokerage activities, see FHLBB Mem. by Williams (Aug. 22, 1986).

A search of federal case law reveals no decisions interpreting the commercial lending provision.