Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

April 3, 2008

Interpretive Letter #1097
April 2008
12 USC 29

Re: Request for legal opinion addressing authority to purchase certain loans secured by liens on real estate

Dear **[ ]**:

This is in response to your request for a legal opinion addressing the proposal by **[*Bank, City, State*]** ("Bank"), to acquire certain assets from commercial real estate mortgage-backed securitization trusts. For the reasons discussed below and based upon the representations made by the Bank, we believe that the Bank's proposal is permissible and consistent with 12 U.S.C. § 29.

Bank's Proposal

The Bank, through its wholly-owned operating subsidiary **[ ]**. ("*OpSub1*"), provides servicing for commercial real estate mortgage-backed securitization ("CMBS") trusts. The Bank proposes to purchase the commercial real estate mortgage loans out of CMBS trusts which are winding down, using a a newly-created operating subsidiary, **[*New OpSub*]**, to make the purchases.[1]

Servicing agreements for most CMBS transactions provide that, when certain thresholds are reached, any one of several parties, including the servicer, may issue a "clean-up call" and purchase all of the remaining assets out of the trust. The remaining assets would consist primarily of loans and may include a small amount of real estate taken DPC by the trust. The Bank represents that DPC real estate would constitute only a small percentage of the value of any CMBS trust's remaining assets.[2]

[1] This opinion addresses the legal permissibility of the proposed activity. The Bank must follow the procedures in 12 C.F.R. § 5.34 to establish the operating subsidiary.

[2] The typical CMBS trust is established as a real estate mortgage investment conduit, or REMIC, and the tax laws governing REMICs impose stringent disposal requirements on DPC real estate. *See* Internal Revenue Code §§ 860G(a)(8) and 856(e), 26 U.S.C. §§ 860G(a)(8) and 856(e). In addition,

The Bank wishes to purchase the commercial real estate mortgage loans out of these CMBS trusts. However, the clean-up call rights require the purchase of all of the assets, including any DPC real estate. The Bank, after consulting with tax and real estate counsel, represents that the right to acquire the DPC real estate from the trust may not be assignable to a third party. Therefore, in order to acquire the loans from the CMBS trusts, the Bank also must acquire any DPC real estate then held by the trust.

The Bank proposes that **[*OpSub1*]** would issue a clean-up call, when the required thresholds are reached, for the CMBS trusts that it services.[3] Prior to purchasing the assets out of a trust, the Bank would know the exact DPC properties in the trust and would contract with an unrelated third party to purchase all the DPC real estate immediately upon the Bank's acquisition of the DPC real estate from the trust. For each DPC parcel, the Bank would receive from the third party the same purchase price that it paid to the trust. As a result, the Bank would be owner of the DPC real estate for only a moment in time and would neither profit nor lose any money on the DPC real estate transactions.

Discussion

The Bank's proposal involves the purchase of loans and a small amount of DPC real estate from CMBS trusts. National banks may purchase and service loans.[4] OCC regulations also broadly and expressly authorize national banks to purchase and sell interests in loans secured by liens on real estate.[5] In connection with this authority, we find that the Bank also may purchase the DPC real estate, for a moment in time, as incidental to the purchase of the loans.

The OCC has permitted national banks to hold for a moment-in-time assets that are not generally permissible investments for national banks if necessary to facilitate a permissible activity. For example, in Interpretive Letter No. 867, we authorized a national bank, in order to facilitate a permissible financing transaction, to acquire and hold legal title to real and personal property for a moment-in-time before transferring title to the customer.[6] Similarly, in Interpretive Letter No. 992, we permitted a national bank to exercise stock warrants, permissibly acquired in lieu of interest on a loan, in order to facilitate their disposition. In that letter, as is the case in the instant proposal, we permitted the acquisition of the interests only for a moment-in-time and only with an agreement in place to sell the interests immediately.[7]

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according to the Bank, a survey conducted in November 2007 by a leading provider of CMBS and commercial mortgage information and technology found that DPC property represented approximately 2.5 % of the aggregate assets in CMBS trusts nearing the threshold for a clean-up call.

[3] In no instance would the Bank, or any affiliate or subsidiary of the Bank, be the trustee of a CMBS trust for which **[*OpSub1*]** issued a clean up call.

[4] 12 U.S.C. § 24(Seventh); 12 C.F.R. § 5.34(e)(5)(v)(D); Interpretive Letter No. 953, *available at* http://www.occ.treas.gov/interp/feb03/int953.pdf.

[5] 12 C.F.R. § 34.3(a).

[6] *Available at* http://www.occ.treas.gov/interp/nov99/int867.pdf.

[7] *Available at* http://www.occ.treas.gov/interp/jun04/int992.pdf. *See also* Corporate Decision No. 97-13 (incidental to permissible corporate restructuring, national bank momentarily may acquire stock of another depository institution), *available at* http://www.occ.treas.gov/interp/mar97/cd97-13.pdf.

In the Bank's proposal, the moment-in-time acquisition of the DPC real estate is necessary to facilitate the acquisition of the loans pursuant to a transaction of the type expressly authorized under 12 C.F.R. § 34.3. Upon a clean-up call being issued, the Bank must purchase all of the trust's assets and cannot assign in advance the rights to purchase the DPC real estate to any third party. Therefore, in order to acquire the loans, the Bank also must acquire the DPC real estate. The Bank has represented that it would acquire the real estate only with an agreement in place to sell the DPC real estate to an unrelated third party at the same price. As discussed, this approach is fully consistent with OCC published precedent, and in our opinion would not be prohibited by 12 U.S.C. § 29.

Conclusion

For the reasons above and based upon the representations made by the Bank, we believe that the Bank may acquire for a moment-in-time the DPC real estate from trusts which are winding down in order to facilitate the permissible acquisition of commercial real estate mortgage loans. If you have any questions, please contact Steven V. Key, Special Counsel, at (202) 874-5300.

Sincerely,

signed

Julie L. Williams
First Senior Deputy Comptroller
and Chief Counsel