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## OCC BULLETIN 1994-43

**Subject: Prompt Corrective Action - Capital  
Restoration Plans Guidelines**  
**Date: June 29, 1994**

**To: Chief Executive Officers of all National  
Banks, Department and Division Heads, and all  
examining personnel**

### Description: Guidelines

#### Purpose

This issuance supplements guidance provided in BC-268 on how the OCC implements its prompt corrective action ("PCA") authority relating to capital restoration plans under 12 U.S.C. 1831o(e)(2)(C). The OCC uses these guidelines to determine whether a controlling company's performance guarantee is acceptable under PCA.

#### Background

Under section 38(e)(2)(C)(ii) of the Federal Deposit Insurance Act (12 U.S.C. 1831o(e)(2)(C)(ii)) federal banking regulators may not accept a capital restoration plan ("CRP") submitted by an undercapitalized bank unless each company that controls the bank has:

- I. guaranteed that the bank will comply with the plan until the bank has been adequately capitalized on average during each of four consecutive calendar quarters, and
- II. provided appropriate assurances of performance.

Each company providing the guarantee is jointly and severally liable for fulfillment of the guarantee, up to the statutory limit of liability. Failure of any company controlling an undercapitalized bank to provide the required guarantee will cause that bank to become subject to restrictions applying to significantly undercapitalized banks. Such failure also establishes grounds for the appointment of a receiver or conservator under 12 U.S.C. 191 and 203.

#### A. Limitation on Liability

Section 1831o and the OCC's regulation at 12 CFR 6.5(i) limit the aggregate liability of all companies controlling an institution to the lesser of:

1. five percent of the bank's total assets at the time the bank was notified or deemed to have notice that it was undercapitalized, or
2. the amount necessary to restore the capital of the bank to the levels required for the institution to be adequately capitalized, as those levels were defined at the time the bank initially failed to comply with its CRP.

#### B. Duration of Guarantee

The guarantee and limit of liability for performance of a capital restoration plan expires after the OCC notifies the national bank in writing that it has remained adequately capitalized for four consecutive calendar quarters (See 12 CFR 6.5(i)(1)(ii)). This will permit the OCC and the bank to verify that the guarantee has expired.

#### C. Additional Guarantees

The OCC's regulation at 12 CFR 6.5(i)(1)(ii) provides that the expiration of a guarantee given by a company or fulfillment of a guarantee given by a company in connection with one CRP does not relieve the company from the obligation to guarantee another CRP that may be required at a future date for the same bank if it again becomes undercapitalized. Fulfillment of one guarantee up to the statutory limit would not reduce the amount of any guarantee of a future CRP for the same bank.

In addition, a new or revised guarantee is required if the bank is required to submit a new or revised CRP pursuant to 12 CFR 6.5(a)(2). Section 6.5(a)(2) provides that a bank that has submitted and is operating under an approved CRP must submit an additional CRP when it falls into a lower capital category if the OCC notifies that bank that it must submit a new or revised CRP.

#### D. Collection of Guarantee

Each company controlling a given bank is jointly and severally liable for the guarantee. The OCC may direct the bank to seek payment of the full amount of the guarantee from any and all the companies issuing the guarantee.

#### E. Failure to Perform Guarantee.

Failure by the company to perform fully its guarantee will constitute a material failure to implement the Bank's capital restoration plan and will subject the bank to the provisions of 12 U.S.C. 1831o(f)(1)(B)(ii) applicable to banks that have failed to implement a capital restoration plan. In addition, the bank may be subject to enforcement actions pursuant to 12 U.S.C. 1818, including civil money penalties, for failure to comply with an OCC regulation.

#### Policy

The OCC will not approve any CRP unless each company controlling the bank submits a written guarantee of the plan. The purpose of the guarantee is for the holding company to provide a financial commitment and appropriate assurances of performance to the OCC that the company's subsidiary bank will comply with the bank's CRP.

The guarantee should, at a minimum, provide the holding company's financial commitment guaranteeing the bank's compliance with the CRP. In addition, the guarantee may include assurances that the company will (1) take actions required by the CRP, (2) ensure that competent management will be selected, (3) restrict transactions between the bank and the company, and (4) discontinue certain risky or inappropriate bank or affiliate activities.

Depending on the company involved, the guarantee may also include "appropriate assurances of performance" such as a promissory note, a pledge of holding company assets, appropriate assurances from bank holding company counsel, a holding company board of directors resolution or other supervisory actions deemed necessary in order to ensure performance.

Attached is a sample guarantee companies may use when guaranteeing capital restoration plans to assure performance. The sample guarantee:

- references the parties to the guarantee (the bank and the guarantor holding company(s));
- incorporates by reference the capital restoration plan submitted for approval by the bank;
- provides that the holding company unconditionally guarantees and provides a financial commitment that the Bank will comply with its CRP;
- provides that the holding company will (1) take any action directly required under the CRP; (2) take any corporate actions necessary to enable the bank to take actions required of the bank under the CRP; (3) not take any action that would impede the bank's ability to implement its CRP; (4) ensure that the bank is staffed by competent management; and (5) restrict transactions between the holding company and the bank;
- states the limit of liability and the promise to pay the amount described;

- incorporates by reference a certified resolution of the board of directors of the holding company regarding the guarantee;
- describes the consideration provided, and certain rights of the parties;
- provides for the pledge of holding company assets, or other appropriate collateral, to secure the guarantee, when deemed appropriate; and,
- includes certain other provisions such as a statement on governing law.

The guarantee is patterned after a standard commercial guarantee. It requires the controlling company to perform on its guarantee when the bank notifies the company that the bank has failed to comply with its CRP. If the bank declines or delays in enforcing the guarantee, the OCC may take action directing the bank to enforce the guarantee or take any other action under PCA or 12 U.S.C. 1818 as may be appropriate. In the event the bank is placed in receivership, the FDIC as receiver would be entitled to the proceeds of any contribution by the company.

#### A. Pledge of Holding Company Assets May Be Required

Section 1831o(e)(2)(C)(ii)(II) states that the holding company must provide "appropriate assurances of performance" to satisfy the guarantee requirement. These assurances will vary on a case-by-case basis depending on the bank's condition and willingness to implement changes, the strength of the holding company, and other relevant factors.

In the case of a cooperative, strong holding company controlling an undercapitalized bank, the OCC will generally not accept a bank's CRP unless it includes a written guarantee from the company along with a copy of its audited financial statements.

In other cases, a pledge of certain non-banking assets may be required. For example, a financially weak holding company that controls an undercapitalized bank will generally be required to pledge assets to secure its guarantee. Similarly, a holding company that controls a significantly or critically undercapitalized bank will generally be expected to include a contractual pledge of assets regardless of financial strength. A security agreement and a UCC-1 financing statement may also be expected when collateral is pledged to secure the holding company's guarantee before the OCC accepts the bank's CRP.

In addition, if the pledged assets are not of a type that a national bank can legally hold, the pledge agreement should provide that the assets will be liquidated within six months of being contributed to the bank.

The need for a pledge also depends on the organizational structure of the holding company. In a multi-tiered holding company, each company is jointly and severally liable for implementation of the bank's capital restoration plans. So, for the bank's CRP to be acceptable, each company must guarantee the CRP and provide adequate assurances of performance. Intermediate shell holding companies may, however, rely on the financial resources of the parent company or of a third party as adequate assurance of performance on the guarantee.

In the case of a shell holding company or a company that has limited resources, a guarantee will be required for the bank's CRP to be acceptable. Given the company's lack of resources, however, a pledge of assets will not generally be required. Instead, the OCC will evaluate the CRP on the same basis that it evaluates plans submitted by banks owned by individuals. If the OCC would approve a CRP submitted by a bank owned by an individual, it will approve a similar CRP submitted by a bank owned by a shell holding company.

#### B. Request for Legal Opinion

The OCC may also request that the bank and the company obtain a legal opinion from the bank holding company's counsel that the guarantee and any pledge of assets securing such guarantee, if applicable, constitutes a legally binding commitment against the holding company that is given in the ordinary course of business for adequate consideration.

### C. Interagency Coordination

In evaluating a holding company guarantee, the OCC may consult with the appropriate Federal Reserve Bank on the condition of the holding company and its ability to fulfill its guarantee. The OCC may also consult with the FDIC on the terms of the guarantee to ensure that the FDIC's interest as receiver would be protected if the bank is later placed in receivership.

### D. Approval on Case-by-Case Basis

The adequacy of any guarantee and assurances of performance by a controlling company will be determined on a case-by-case basis by the appropriate OCC supervisory office.

### Responsible Office

For further information, contact Special Supervision at (202) 649-6370.

Stephen R. Steinbrink  
Senior Deputy Comptroller  
for Bank Supervision Operations

### Related Links

- [Sample Guarantee](#)

RESCINDED