

December 18, 2009

Re: Interpretive Letter 2-2009    Application for Exemption under  
Section 362.106(4), RSMo Supp 2008

In a letter dated November 18, 2009, you requested a determination from this office that would permit Missouri state-chartered banks to increase the debt or equity investment in individual projects which promote public welfare, including community development projects, beyond the 5 percent of unimpaired capital and surplus currently allowed by state law to 15 percent of unimpaired capital and surplus (defined in 12 CFR Section 24.2), which is the same level permitted to certain national banks. You cited 12 USC 24 (Eleventh), OCC Bulletin 2006-44 and OCC Bulletin 2008-22, both issued by the Comptroller of the Currency (OCC), which authorize this level of investment for national banks provided conditions are met.

Under Section 362.106(4)(e), RSMo Supp 2008<sup>1</sup>, state-chartered banks may conduct any activity that national banks are expressly authorized to conduct, if the Missouri bank has provided notice to the Director of Finance who determines within the 30 day notice period, that the proposed activity is not unsafe or unsound and the bank meets the conditions prescribed for national banks. The director may either take no action or issue an interpretive letter that specifically describes the activity permitted and any limitations on the activity.

### **National Bank Authority**

Prior to enactment of the Financial Services Regulatory Relief Act (FSRRA) in 2006, national banks were allowed to invest in aggregate up to 5 percent of the bank's unimpaired capital and surplus in public welfare investments (defined in 12 CFR Section 24.6 as those designed primarily to promote the public welfare, by benefiting low and moderate income communities or families) without prior OCC approval. FSRRA changed and expanded the authority for national

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<sup>1</sup> All state statutory citations are to the 2008 Supplement to the Revised Statutes of Missouri, unless otherwise indicated.

banks to directly or indirectly make public welfare investments under 12 USC Section 24 (Eleventh) up to an additional 10 percent (15 percent total) of capital and surplus, provided the bank made written request to do so, and the OCC determined in writing that the additional investment would (1) not pose undue risk to the deposit insurance fund and (2) the investing national bank was at least adequately capitalized. If the OCC grants written approval for the bank to invest beyond the 5 percent limit, an after-the-fact notice is required to be filed with the OCC in accordance with 12 CFR Section 24.5, within ten days, for each investment made above the 5 percent limit.

12 USC Section 24 (Eleventh), states the OCC shall limit an association's investment in any one project and its aggregate investment under this paragraph. Federal law allows a national bank to directly or indirectly invest in aggregate, up to 5 percent of unimpaired capital and surplus in public welfare investments and provides for the level of investment to be increased up to an aggregate of 15 percent of unimpaired capital and surplus provided the investment does not pose undue risk to the deposit insurance fund, the investing bank is at least adequately capitalized and the investment would not expose the bank to unlimited liability.

The implementing federal regulations, 12 CFR Section 24 contain guidelines and ongoing procedures that must be followed in order for national banks to invest beyond the 5 percent aggregate limit. In no event is the aggregate public welfare investment allowed to exceed 15 percent of the bank's unimpaired capital and surplus. In addition, no such investment is allowed that would expose the bank to unlimited liability and the investment cannot involve properties carried on the bank's books as Other Real Estate.

### **Missouri Authority**

Under current state law, Section 362.105.1(15), a Missouri bank is permitted to make debt or equity investments in corporations or projects to promote community development and its welfare, provided the aggregate of the investment in all such corporations or projects does not exceed 5 percent of the bank's unimpaired capital. This limit does not apply to loans made under the authority of other provisions of state law. In addition, 20 CSR 1140-2.067(2)(A) limits the investment in any one community development project to no more than 2 percent of the bank's unimpaired capital.

The Division modified this investment limitation through issuance of Interpretive Letter 1-2009 on April 3, 2009. The letter was the result of a similar wild card exemption request. Based on the interpretive letter, Missouri state-chartered banks are now allowed to invest up to 5 percent of unimpaired capital,

which is defined to include common and preferred stock, undivided profits, surplus and allowance for loan and lease losses, in an individual public welfare or community development project with a 15 percent of unimpaired capital aggregate limit on such projects.

### **SUMMARY & FINDINGS**

If the director chooses to grant a request made pursuant to Section 362.106(4)(e), the director must determine that the proposed activity is not an unsafe or unsound practice and that the bank meets the prescribed standards for conducting such activity. However, the Commissioner finds that allowing a bank to invest more than 5 percent of unimpaired capital in any single investment in a public welfare or community development project is an unsafe and unsound practice.

The standards for national banks who apply to increase their aggregate investment in public welfare projects, up to a maximum of 15 percent of unimpaired capital and surplus, are that the investment cannot pose undue risk to the insurance fund, the investing bank must be at least adequately capitalized and that the investment would not expose the bank to unlimited liability.

In the request letter, you certify that the requested investment in the project will not expose the bank to unlimited liability. Additionally, your bank is adequately capitalized. National banks seeking to exceed the 5 percent investment limit require written requests to the OCC. Nothing in the current wild card request indicates the OCC has approved a 15 percent investment in one project. However, the Commissioner does not find allowing this level of investment to be a safe and sound business practice.

This is particularly true in the case of your bank. In a letter dated October 13, 2009, your bank informed the Division that it was investing between 2 and 5 percent of capital in a different public welfare or community development project. The current proposal seeks authority for an additional, single investment of approximately 10 percent of capital. When added together, these two projects combined already total 15 percent of capital, the aggregate limit established in Interpretative Letter 1-2009 and the investment limit established for national banks. Therefore, investment in the project on its own could not be approved for 15 percent even if the Commissioner considered such an investment to be a safe and sound banking practice.

The investment described in the request represents a complex transaction requiring experienced personnel with the expertise to evaluate the substantial risk

involved. At a minimum, banks need detailed policies and procedures specific to these transactions. As these investments are long term and contain multiple risks, banks lacking experience in this area may not fully appreciate the risks including but not limited to those associated with liquidity, capital and the project generally. Additionally, to allow more than 5 percent of unimpaired capital in a single project hinders the bank's risk diversification for the life of the underlying project.

The Commissioner hereby determines that allowing the bank to invest up to 15 percent of the bank's unimpaired capital, authorized for national banks under 12 USC Section 24 (Eleventh) in an individual project, is an unsafe and unsound practice for Missouri banks. Therefore, the limitations established in Interpretative Letter 1-2009 remain the standard for state-chartered banks in Missouri.

This letter will be filed today with the Office of the Missouri Secretary of State and posted on the public internet website of the Division of Finance. It will become effective ten days after filing with the Secretary of State. If you have any questions regarding this matter, please contact Christie A. Kincannon, Chief Counsel for the Missouri Division of Finance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard J. Weaver".

Richard J. Weaver  
Commissioner of Finance

RJW:CAK:pn