

DEPARTMENT OF ADMINISTRATION  
DIVISION OF BANKING & FINANCIAL INSTITUTIONS



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TO: Montana State Chartered Banks  
FROM: Kelly O'Sullivan, Deputy Commissioner  
Division of Banking and Financial Institutions  
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**ADVISORY OPINION**

**Issue**

The Montana Division of Banking and Financial Institutions (Division) has been asked to provide an advisory opinion regarding whether the accounting treatment of a sale for purposes of ASC 860 is determinative as to whether a legal lending limit violation has occurred under Montana law.

**Answer**

No, the accounting treatment does not control whether a legal lending limit violation has occurred. A legal lending limit violation is determined by reference to Mont. Code Ann. § 32-1-432 and 2.59.108 ARM.

**Rationale**

Montana law provides the total loans or extensions of credit to a person, partnership, or corporation by a bank cannot exceed 20% of the amount of unimpaired capital and surplus of the bank. Mont. Code Ann. § 32-1-432.

The Division has adopted a rule to interpret this section. The rule contains two general subject areas. The first section deals with when loans or extensions of credit are combined for legal lending limit purposes. The second general subject is exclusions from the legal lending limit. ARM 2.59.108.

This advisory opinion deals only with ARM 2.59.108(3)(a). That section provides:

- (3) The following items will not be included when calculating the amount of a person's total loans and extensions of credit:
  - (a) loans or extensions of credit, and participation in loans and extensions of credit that have been sold, provided:
    - (i) the loan, extension of credit, or the portion of the loan or extension of credit sold as a participation is sold without recourse to the selling bank; and

(ii) in the case of participation, the participation agreement provides for a pro rata sharing of credit risk proportionate to the respective interests of the originating and participating lenders.

(A) Where a participation agreement provides that repayment must be applied first to the portions sold, a pro rata sharing will be deemed to exist only if the agreement also provides that, in the event of a default or comparable event defined in the agreement, participants must share in all subsequent repayments and collections in proportion to their percentage participation at the time of the occurrence of the event.

The question at hand is whether the accounting treatment in ASC 860† controls the meaning of "sold" for purposes of the legal lending limit statute. We hold that it does not. "Sold" as used in ARM 2.59.108(3)(a) means the transfer of the title and possession of property in exchange for consideration. The rule makes no reference to the accounting treatment of the asset. If the accounting treatment of the asset were used to define "sold," it would lead to an absurd result of having the meaning of "sold" under Montana law be dependent on the definitional decisions of the FASB and would make provisions of Montana law obsolete or without meaning.

This opinion does not apply to the reporting of the bank's financial statements which are governed by their respective instructions.