

APPENDIX C
BCSB SUBMISSION TO INDEPENDENT REVIEWER,
FEBRUARY 2004

DRAFTING SUGGESTIONS FOR THE GUIDANCE FOR
SUBSCRIBERS, TO CLARIFY THE MEANING OF “UNLIMITED”
IN RELATION TO GUARANTEES

1. CHANGE TO THE BANKING CODE
GUIDANCE FOR SUBSCRIBERS:

BANKING CODE PARAGRAPH 13.4

13.4 *If you want us to accept a **guarantee** or other **security** from someone for your liabilities, we may ask you for your permission to give confidential information about your finances to the person giving the **guarantee** or other **security**, or to their legal adviser. We will also:*

- *Encourage them to take independent legal advice to make sure that they understand their commitment and the possible consequences of their decision (where appropriate, the documents we ask them to sign will contain this recommendation as a clear and obvious notice);*
- *Tell them that by giving the **guarantee** or other **security** they may become liable instead of, or as well as, you; and*
- *Tell them what their liability will be.*

*We will not take an unlimited **guarantee**.*

This provision was modified in the 1997 edition of the Code at the suggestion of the Banking Ombudsman who was keen that regular financial information about the person on whose behalf a guarantee/indemnity or other security is given should always be made available to the guarantor or granters of third party security ('granters'), so that they would be able to assess the likelihood of being called upon to pay. The Code allows this so long as permission is given and confidence is not breached. If the guarantor or granter requests confidential financial information (with the exception of the current level of liability), for example details of balances, copy statements, etc, the customer's consent should first be obtained (as required by Section 11).

It is important that guarantors or granters receive independent legal advice to help them understand the full nature of their commitment and the potential

implications of their decision. Case law on this issue is well developed and subscribers should encourage, as far as possible, potential guarantors or granters to take independent advice. Subscribers may wish to go further than what is covered in this section and actually get a potential guarantor or grantee who refuses to take legal advice to sign a declaration to that effect. In any case, the recommendation to take independent legal advice and the potential consequences of their decision should be stated clearly on all appropriate documents that the guarantor or grantee is asked to sign.

In relation to guarantees/indemnities, subscribers must also inform guarantors or granters that, by giving the guarantee/indemnity or other third party security, they may have to pay instead of or as well as the customer. Subscribers must also tell the guarantor what the limit of their liability is and must not take an unlimited guarantee. This is to ensure that the guarantor does not become liable for a further commitment (in respect of an additional advance of principal) that they do not know about, without a further guarantee/indemnity being taken.

“Unlimited”, in respect of a guarantee, refers to the capital amount of the loan. It does not apply to interest, charges and arrears, etc, which may still accumulate in accordance with the terms of the agreement to provide credit and the guarantee documentation. An explanation of this should be covered in the guarantee/indemnity or other security documents that the guarantor is asked to sign.

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Other forms of third party security than a guarantee may still be taken on an unlimited basis, provided that the limit of the grantee’s liability from time to time is explained in a side letter. This is to avoid the need for the expense and inconvenience to customers in taking fresh security each time a facility changes.

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2. CHANGE TO THE BUSINESS BANKING CODE GUIDANCE FOR SUBSCRIBERS:

BUSINESS BANKING CODE PARAGRAPH 13.8

13.8 We may agree to accept **security** provided by another person to support your business's liabilities. If you want us to accept a **guarantee** or other **security** from another person for your liabilities, we may ask you for your permission to give confidential information about your finances to the person giving the **guarantee** or other **security**, or to their legal adviser.

*If the **guarantee** or other **security** is provided by an individual rather than a business, we will also:*

- *recommend that the person providing the guarantee gets independent legal advice to make sure that they understand their commitment and the possible consequences of their decision (where appropriate, the documents we ask them to sign will contain this recommendation as a clear and obvious notice);*
- *tell them that by giving the **guarantee** or other **security** they may become liable instead of, or as well as, you; and*
- *tell them what their liability will be.*

*We will not take an unlimited **guarantee** from individuals, other than to support your liabilities under a **merchant agreement**. We will accept unlimited **guarantees** from companies.*

This provision was included at the suggestion of the Banking Ombudsman who was keen that regular financial information about the person on whose behalf a guarantee or other security is given should always be made available to the guarantor or granters of third party security ('granters'), so that they would be able to assess the likelihood of being called upon to pay. The Code allows this so long as permission is given and confidence is not breached. If the guarantor or granter requests confidential financial information (with the exception of the current level of liability) for example, details of balances, copy statements, etc, the customer's consent should first be obtained (as required by section 11).

It is important that guarantors or granters (including directors providing guarantees in support of their limited companies) receive independent legal advice to help them understand the full nature of their commitment and the potential implications of their decision. Subscribers should encourage, as far as possible, potential guarantors or granters to take independent advice. Subscribers may wish to go further than what is covered in this section and actually get a potential guarantor or granter who refuses to take legal advice to sign a declaration to that effect. In any case, the recommendation to take

independent legal advice and the potential consequences of their decision should be stated clearly on all appropriate documents that the guarantor or granter is asked to sign.

In relation to guarantees/indemnities, subscribers must also inform guarantors or granters that, by giving the guarantee/indemnity or other third party security, they may have to pay instead of or as well as the customer. Subscribers must also tell the guarantor what the limit of their liability is and must not take an unlimited guarantee from individuals. This is to ensure that the guarantor does not become liable for a further commitment (in respect of an additional advance of principal) that he does not know about, without a further guarantee/indemnity being taken.

"Unlimited", in respect of a guarantee, refers to the capital amount of the loan. It does not apply to interest, charges and arrears, etc, which may still accumulate in accordance with the terms of the agreement to provide credit and the guarantee documentation. An explanation of this should be covered in the guarantee/indemnity or other security documents that the guarantor is asked to sign.

As far as merchant services are concerned, whilst the Code currently permits unlimited guarantees from individuals, it is preferable for such guarantees to be limited. Where an unlimited guarantee is requested, subscribers must explain why such security is required.

Other forms of third party security than a guarantee may still be taken on an unlimited basis, provided that the limit of the granter's liability from time to time is explained in a side letter. This is to avoid the need for the expense and inconvenience to customers of taking fresh security each time a facility changes.

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In the case of limited companies, which are part of a group structure, subscribers may continue to take unlimited guarantees from the constituent companies in support of borrowing by other companies in the group.

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